Scheduled for Oral Argument on _____

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

18-1165, 18-1171

18-1165

MICHAEL CETTA, INC., d/b/a SPARKS RESTAURANT,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

18-1171

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

MICHAEL CETTA, INC., d/b/a SPARKS RESTAURANT,

Respondent.

ON PETITION FOR REVIEW FROM THE NATIONAL LABOR RELATIONS BOARD

PUBLIC APPENDIX - SEALED MATERIAL IN SEPARATE SUPPLEMENT VOLUME I OF II (Pages A1 to A470)

USHA DHEENAN
DAVID S. HABENSTREIT
GREGOIRE F. SAUTER
NATIONAL LABOR RELATIONS BOARD
APPELLATE AND SUPREME COURT
LITIGATION BRANCH
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960
usha.dheenan@nlrb.gov

Attorneys for Respondent

JON SCHUYLER BROOKS
MICHELMAN & ROBINSON, LLP
800 Third Avenue, 24th Floor
New York, New York 10022
(212) 730-7700
jbrooks@mrllp.com

Attorneys for Petitioner

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Michael Cetta, Inc. d/b/a Sparks Restaurant *and* United Food and Commercial Workers Local 342. Cases 02–CA–142626 and 02–CA–144852

May 24, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On November 18, 2016, Administrative Law Judge Lauren Esposito issued the attached decision. The Respondent filed exceptions and a brief in support. The General Counsel filed an answering brief, and the Respondent filed a reply. The General Counsel filed a cross-exception and a brief in support, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order as modified and set forth in full below.[4]

ORDER

The National Labor Relations Board orders that the Respondent, Michael Cetta, Inc. d/b/a Sparks Restaurant, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for engaging in an economic strike.

(b) Failing and refusing to reinstate striking employees to their former or substantially equivalent positions of employment in the absence of a legitimate and substantial business justification.

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[1] The judge recommended a broad cease-and-desist order. We adopt the judge's recommendation in the absence of a specific exception. See *Leiser Construction*, 349 NLRB 413, 418 fn. 28 (2007), enfd. 281 Fed. Appx. 781 (10th Cir. 2008).

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The General Counsel moves to strike the Respondent's brief in support of its exceptions on the ground that it fails to comply with the Board's Rules and Regulations in that it does not contain references to the specific exceptions to which its arguments relate. Although the Respondent's brief does not comply in all particulars with Sec. 102.46(a)(2), we accept it because the Respondent's brief is otherwise substantially compliant. See *Metta Electric*, 338 NLRB 1059, 1059 (2003).

The General Counsel moves to strike the appendix to the Respondent's brief in support of its exceptions. We agree with the General Counsel that the documents comprising the appendix were not introduced as evidence at the hearing and, therefore, cannot be introduced into the record at this point. See Sec. 102.45(b) of the Board's Rules and Regulations. Accordingly, we grant the General Counsel's motion to strike them. *S. Freedman Electric, Inc.*, 256 NLRB 432, 432 fn. 1 (1981).

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We deny the Respondent's motion to reopen the record to receive additional evidence. The evidence the Respondent seeks to adduce has not been shown to be newly discovered or previously unavailable, as required by Sec. 102.48(c)(1) of the Board's Rules and Regulations.

The Respondent excepts to the judge's finding that it violated Sec. 8(a)(1) by soliciting employees to withdraw their support for the Union. The Respondent, however, does not state, either in its exceptions or supporting brief, any grounds on which this purportedly erroneous finding should be overturned. Therefore, in accordance with Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations, we shall disregard this exception. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) by failing and refusing to reinstate and by discharging the striking employees, we find it unnecessary to pass on whether the Respondent also violated Sec. 8(a)(3) and (1) by denying employees their right to be placed on a preferential hiring list. Finding the additional 8(a)(3) violation would not materially affect the remedy. Member Pearce agrees that it is unnecessary to pass, but he further notes that it is undisputed the Respondent did not provide evidence of a preferential hiring list prior to September 11, 2015.

Member Emanuel agrees that the Respondent violated Sec. 8(a)(3) and (1) by failing and refusing to reinstate the striking employees after their unconditional offer to return to work. He finds that the Respondent failed to carry its burden to prove, as an affirmative defense, that it hired permanent replacements before the unconditional offer to return. The Respondent was required to prove "a mutual understanding with the replacements that they are permanent," and it failed to do so. See *Jones Plastic & Engineering Co.*, 351 NLRB 61, 64 (2007), pet. for rev. denied. 544 F.3d 841 (7th Cir. 2008); *Consolidated Delivery & Logistics, Inc.*, 337 NLRB 524 (2002), enfd. 63 Fed. Appx. 520 (D.C. Cir. 2003). Member Emanuel observes that the Respondent's letters to the replacements offering them employment would have been adequate to establish a mutual understanding if the Respondent had provided specific evidence of when the letters were signed by the replacements and returned. Member Emanuel also finds it unnecessary to pass on whether the Respondent violated Sec. 8(a)(3) and (1) by discharging the striking employees because the additional violation would not materially affect the remedy.

We shall modify the judge's remedy and recommended Order in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and to conform to our findings and the Board's standard remedial language. We shall also substitute a new notice to conform to the Order as modified.

[4] The General Counsel filed a limited cross-exception asking the Board to reconsider its remedy for unlawfully discharged economic strikers who were permanently replaced prior to their discharge. In view of our finding that the Respondent failed to establish it had permanently replaced the striking employees, we find it unnecessary to pass on this exception because it would not affect the remedy.

(c) Soliciting employees to withdraw their support for the United Food and Commercial Workers Local 342 (Union).

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Gerardo Alarcon, Fredy Albarracin, Marko Beljan, James Campanella, Ian Collins, Elvis Cutra, Arlind Demaj, Kristofer Fuller, Adam Gjevukaj, Valjon Hajdini, Elvi Hoxhaj, Juan Iriarte, Ante Ivre, Amir Jakupi, Bardhyl Kelmendi, Jeton Kerahoda, Milazim Kukaj, Rachid Lamniji, Valon Lokaj, Silvio Lustica, Iber Mushkolaj, Gani Neziraj, Kenan Neziraj, Xhavit Neziraj, Adnan Nuredini, Juan Patino, Sadik Prelvukaj, Francisco Puente, Ermal Qelia, Nagip Resulbegu, Khalid Seddiki, Youssef Semlalo El Idrissi, Fatlum Spahija, Andrzej Stepien, Alim Tagani, and Mergim Zeqiraj full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make the above employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its New York, New York facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 19, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. May 24, 2018

_____
Mark Gaston Pearce, Member

_____
Lauren McFerran, Member

_____
William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL NOT fail to reinstate striking employees to their former or substantially equivalent positions in the absence of a legitimate and substantial business justification.

WE WILL NOT solicit you to withdraw your support for the United Food and Commercial Workers Local 342 (Union).

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Gerardo Alarcon, Fredy Albarracin, Marko Beljan, James Campanella, Ian Collins, Elvis Cutra, Arlind Demaj, Kristofer Fuller, Adem Gjevukaj, Valjon Hajdini, Elvi Hoxhaj, Juan Iriarte, Ante Ivre, Amir Jakupi, Bardhyl Kelmendi, Jeton Kerahoda, Milazim Kukaj, Rachid Lamniji, Valon Lokaj, Silvio Lustica, Iber Mushkolaj, Gani Neziraj, Kenan Neziraj, Xhavit Neziraj, Adnan Nuredini, Juan Patino, Sadik Prelvukaj, Francisco Puente, Ermal Qelia, Nagip Resulbegu, Khalid Seddiki, Youssef Semlalo El Idrissi, Fatlum Spahija, Andrzej Stepien, Alim Tagani, and Mergim Zeqiraj full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make those employees whole for any loss of earnings and other benefits resulting from our failure to reinstate them after their unconditional offer to return to work and their discharge, less any net interim earnings, plus interest and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate those employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of those employees and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

MICHAEL CETTA, INC. D/B/A SPARKS RESTAURANT

The Board's decision can be found at www.nlrb.gov/case/02-CA-142626 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half St, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Rebecca A. Leaf, Esq., for the General Counsel.
Thomas J. Bianco, Esq., Marc B. Zimmerman, Esq., and *Regina E. Faul, Esq.,* for the Respondent.
Martin Milner, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAUREN ESPOSITO, Administrative Law Judge. Based upon a charge in Case 02–CA–142626, filed on December 10, 2014, and amended on January 9, 2015, and upon a charge in Case 2-CA-144852, filed on January 22, 2015, by United Food and Commercial Workers Local 342 ("Local 342" or "the Union"), an Order consolidating cases, consolidated complaint, and notice of hearing issued on May 29, 2015 (the "complaint"). The complaint alleges that Michael Cetta, Inc. d/b/a Sparks Restaurant ("Sparks" or "Respondent") violated Sections 8(a)(1) and (3) of the Act by failing and refusing to reinstate striking employees despite an unconditional offer to return to work, denying the striking employees their right to be placed on a preferential hiring list, and discharging the striking employees. The complaint further alleges that Sparks violated Section 8(a)(1)

by soliciting employees to withdraw their support for the Union. On September 18, 2015, the Regional Director, Region 2 issued an Order amending complaint and amendment to complaint stating that as part of the Remedy General Counsel seeks an order requiring that Respondent offer reinstatement to all of the striking employees and make them whole from the date of their discharge, despite the fact that Respondent had previously hired permanent replacement employees. This case was tried before me on October 7, 9, and 13 through 16, 2015, in New York, New York.

After the conclusion of the trial, the parties filed briefs, which I have read and considered. Base on those briefs, and the entire record in the case, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Sparks is a restaurant located at 210 East 46th Street, New York, New York, engaged in the sale of food and beverages. Sparks admits and I find that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

Sparks stipulated at the hearing and I find that Local 342 is a labor organization within the meaning of Section 2(5) of the Act (Tr. 7).

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

Respondent operates a steakhouse restaurant at its 210 East 46th Street location, preparing and serving food and drinks to individual customers and for private parties arranged on its premises (Tr. 245–246, 250). The restaurant is on two floors with some rooms for individual or "a la carte" dining and other small rooms for private events (Tr. 249–250). Sparks is open Monday through Friday for both lunch and dinner, and on Saturday for dinner only (Tr. 246). Lunch begins around 11:30 a.m. or noon, and runs until approximately 3 p.m. (Tr. 246). Dinner begins at around 5 p.m., and continues until the customers with the last reservation finish their meals (Tr. 246). Sparks employs waiters and bartenders, as well as kitchen workers such as cooks/chefs, dishwashers, and prep workers (Tr. 246–247). Respondent also employs an office manager, Shailesh Desai, and an assistant to Desai (Tr. 248). Desai testified at the hearing on behalf of Sparks.

Michael and Steven Cetta are owners of Sparks, and its president and vice president, respectively. Sparks stipulated at the hearing that Michael and Steven Cetta, as well as Maitre'd Valter Kapovic, were at all material times supervisors within the meaning of Section 2(11) of the Act, and agents of Sparks acting on its behalf within the meaning of Section 2(13) (Tr. 7). Steven Cetta testified at the hearing that as vice president he is responsible for overseeing "everything" and "everybody." (Tr. 244.) In addition to Kapovic, Sparks employs managers named Abdul, Ricardo (Cordero), Octavio, and Nick, all of whom report to Steven Cetta (Tr. 244–245). In addition, since 2009, Sparks has engaged Susan Edelstein as a human resources consultant (Tr. 287–288). Edelstein testified in that capacity and as Custodian of Sparks' personnel records (Tr. 288).

2. Events prior to the December 10, 2014 strike

Local 342 was certified as the exclusive collective-bargaining representative of a unit of waiters and bartenders at Sparks on July 11, 2013, and since then the parties have had approximately 8 negotiating sessions but have not entered into a collective-bargaining agreement (Tr. 32–34, 174–175). Negotiations have been generally attended by Director of Contracts, Louis LoIacono, his executive assistant Mary Ann Kelly, representative Carolina Martinez, and Shop Stewards Kristofer Fuller and Valjon Hajdini for Local 342 (Tr. 99–100, 154, 175–176). Attorneys Marc Zimmerman and Regina Faul, Steven Cetta, and Susan Edelstein have attended negotiations for Sparks. (Tr. 100, 176, 251.)

After a bargaining session on December 5, 2014, frustrated with what they perceived of a lack of movement on the part of Sparks in negotiations, the waiters and bartenders decided to go on strike that evening (Tr. 34). The waiters and bartenders went on strike for approximately 2 hours on the evening of December 5, 2014, from roughly 7 to 9 p.m., returning to work after making an unconditional offer (Tr. 34–35, 47, 55–56, 101–102).

Waiter Valjon Hajdini testified that the next day, December 6, 2014, Manager Valter Kapovic asked to speak with him when he arrived at work. The two spoke in the Madison Room downstairs, one of the rooms used for private parties. Hajdini testified that Kapovic said he was concerned about the waiters and bartenders' going on strike. According to Hajdini, Kapovic stated that he was interested in buying the restaurant, and had investors, but that the strike would "drag the business down" and the investors would "back off." Hajdini stated that the waiters and bartenders "were not looking to go on strike again," but were only looking for "a simple contract." Hajdini stated that, "if you don't want us to go on strike . . . make an offer that is easy for us to accept." Kapovic said that he was going to talk to Steve Cetta, "and see if we can do something about that." Kapovic then asked "can we vote the Union out" if he and his investors bought the restaurant. Hajdini responded, "I don't see why the Union bothers you. All we want is a simple contract—that we get treated fairly."[1] [Tr. 39–40.]

3. The December 10, 2014 strike and subsequent events

Frustrated with the lack of progress in negotiations, the waiters and bartenders began another strike at approximately 7 p.m. on December 10, 2014 (Tr. 35–36, 102–105, 154–155, 252). A total of 36 employees engaged in the strike, 34 waiters and 2 bartenders.[2] The nonstriking employees consisted of bargain-

[1] Kapovic did not testify at the hearing.

[2] The bartenders and waiters who engaged in the strike beginning December 10, 2014, are Gerardo Alarcon, Fredy Albarracin, Marko Beljan, James Campanella, Ian Collins, Elvis Cutra, Arlind Demaj, Kristofer Fuller, Adem Gjevukaj, Valjon Hajdini, Elvi Hoxhaj, Juan Iriarte, Ante Ivre, Amir Jakupi, Bardhyl Kelmendi, Jeton Kerahoda, Milazim Kukaj, Rachid Lamniji, Valon Lokaj, Silvio Lustica, Iber Mushkolaj, Gani Neziraj, Kenan Neziraj, Xhavit Neziraj, Adnan Nuredini, Juan Patino, Sadik Prelvukaj, Francisco Puente, Ermal Qelia,

ing unit employees who decided not to participate in the strike and 5 employees referred to by Respondent as "seasonal" (Respondent's posthearing br. at 34). Respondent stipulated at the hearing and I find that the strike which began on December 10, 2014, was concerted in nature (Tr. 7–8).

On December 19, 2014, the striking employees together with union representatives Steve Boris and John decided to make an unconditional offer to return to work. Bartender Elvi Hoxhaj testified that between 3:30 and 4:30 p.m. that day, he and the two union representatives decided that they would go into the restaurant and make an unconditional offer to return to work. As they entered the restaurant, they were stopped in the vestibule by a security guard. Boris explained to security that Hoxhaj was a worker and they were union representatives, and that "they wanted to talk to management and ownership about an unconditional offer to return to work." According to Hoxhaj, security told the group to stay where they were, and the security guard would go inside and convey the message. Hoxhaj then saw the security guard speak to Kapovic, who was on the phone. After they spoke, one of the security guards returned to speak with Hoxhaj and the union representatives, who stated, "we're just trying to get an unconditional offer to return to work." The security guard responded, "I know, but they don't want you in here." [Tr. 156–159.] Other employees were subsequently informed by Boris that Local 342 had made an unconditional offer for the striking employees to return to work, which Sparks had rejected (Tr. 59–60, 82–85).

On December 19, 2014, at 8:55 p.m., Local 342 Secretary-Treasurer sent the following email to Marc Zimmerman:

> Good evening. I am Lisa O'Leary, Secretary Treasurer of UFCW Local 342 and I am authorized to send you this email on behalf of Local 342. Local 342 today has made an unconditional offer to return to work, and that offer remains. President Abondolo shared with me his email exchange with you earlier today. I write again to confirm that the offer to return to work is unconditional, and tied to no additional action being performed by your client. UFCW Local 342 continues its offer to bargain prior to your January 8th date, but this continuing offer to bargain, which has at all times been rejected by your client, is separate from Local 342's unconditional offer to return to work. I suspect you are aware of this, but if not I am telling you so here.
>
> * * *
>
> The community groups, NYPD, and the local Councilman have all spoken with Local 342 at various times in the last week to inquire if the Union and your client are talking, and at least make an attempt to resolve the dispute. We have sadly had to report that you rejected the free services of Federal Mediation, and are in fact not interested in communication prior to January 8th. Because various people in the community have expressed concern about the situation, UFCW made the unconditional offer to return to work today as a demonstration of good faith. Your client has so far rejected the offer. It is the Union's position that the employees are locked out, unless or until the employer should accept the unconditional offer to return to work.
>
> I close by telling you that since your client has rejected the free services of a professional labor mediator, Local 342 believes we should at this time restrict communications with you to one person at Local 342. We do this with the intent of reducing opportunity for unintentional misunderstandings. President Abondolo requested I provide you with my cell number […] in the event your client wishes to communicate with the Union prior to January 8th. You have my email address. Should your client wish to accept the unconditional offer to return, I would be your contact person. Should any other matter arise, I am your contact person. At this time Local 342 will of course meet on January 8th if your client is willing to do so. We will need to find a neutral, acceptable place to meet, so at some point prior to the 8th of January you can let me know when that can be discussed. We can use the Federal Mediation offices in Woodbridge New Jersey for free, even if your client will not permit the assistance of a Federal Mediator. If that is not acceptable then we will have to agree to a hotel. Thank you for your time.

The next morning at 10:31 a.m., Zimmerman wrote to O'Leary acknowledging receipt of her email, and on Monday, December 22, 2014, at 10:53 a.m. sent O'Leary the following response:

> I write in response to your e-mail Friday evening and apologize for not getting back to you sooner.
>
> The e-mails I received on Friday from Janel D'Ammassa (on Rich's behalf) did not propose an unconditional offer to return to work of the striking employees. Rather, Rich's offer was conditioned on Sparks' agreement to "meet for a bargaining session some time between Christmas and New Year's Eve." Nonetheless, I understand from your e-mail that the union has since revised that position and now proposes an unconditional return of the striking employees.
>
> Due to serious misconduct and unprotected activity by the union, its representatives and the striking employees during the two separate strikes at Sparks between December 5 and December 19, including without limitation, violence, threats and intimidation towards patrons and employees, destruction of property and trespass, be advised that Sparks must reject the union's offer to return the striking employees to work at this time. After much consideration, Sparks has determined this option best protects the safety and security of its patrons, employees and delivery people from the conduct described above, and reserves all legal rights in connection with the union's and Sparks' employees' conduct.
>
> Sparks' decision has no bearing on its desire to continue to bargain in good faith with the union for an initial contract, and we look forward to meeting in person on January 8. Alternatively, Sparks would be able to reschedule our next bargaining session to January 7, if the union would be willing to push our normal start time back a bit to 11:30 a.m. Please let me know if that date/time works for the union. Woodbridge, New Jersey is not a convenient location for us to meet. If the union is unwilling to use our offices (as has been our custom to alter-

Nagip Resulbegu, Khalid Seddiki, Youssef Semlalo El Idrissi, Fatlum Spahija, Andrzej Stepien, Alim Tagani, and Mergim Zeqiraj.

> nate between our place and yours), we can arrange for a "neutral" site that is more accessible to both parties. In the interim, I fully expect to provide you with Sparks' written counterproposals to the union's December 10 bargaining proposals early this week and welcome any written response the union sees fit to make in advance of our in-person bargaining session.

O'Leary responded at 11:14 a.m.:

> UFCW Local 342 disagrees with your characterization of events in the second and third paragraphs below. I restate: UFCW Local 342 continues to make an unconditional offer to return to work, and that our position is that Sparks employees are locked out. I restate: UFCW Local 342 urges your client to reconsider its position regarding mediation services. I will need to make sure January 7th is good before I confirm, but will get back to you without unreasonable delay. Thank you for your response, and I will pass it on.

[GC Exh. 9.]

The parties also discussed the return of the striking employees at the next negotiating session, on January 8, 2015. Louis LoIacono, the union's spokesperson at this session, testified that much of the session consisted of the Union's requesting information necessary for it to formulate bargaining proposals (Tr. 176–178). LoIacono testified that after bargaining concluded he had asked Marc Zimmerman to speak with him. Zimmerman approached with Sparks attorney, Regina Faul, and LoIacono asked Zimmerman if he was going to respond to the Union's unconditional offer to return to work, and return the striking employees to their jobs. Zimmerman responded that he was protecting Sparks' property at the time and could not do so, and suggested that LoIacono "put it in writing." LoIacono asked Zimmerman whether he had any "proof or evidence of anything," and Zimmerman again told him to put an information request in writing. [Tr. 176–177; see also Tr. 36–37, 106–107, 126–127.] LoIacono and the shop stewards informed the striking employees of the events of this negotiating session (Tr. 38–39, 107–108, 177–178).

Subsequently on January 9, 2015, Jhana Branker, Abondolo's executive assistant, sent an email on Abondolo's behalf to Zimmerman, requesting information on a number of different topics (Tr. 179; GC Exh. 3). The email contained the following request for information:

> 7. Copy of any evidence and/or videos that the employer has pertaining as evidence to support the employer's representative's response to the Union's unconditional return to work. We were told in writing by the employer representative that the employees could not return to work due to the fact that the representative was protecting his client's property due to incidents that took place at Sparks which had nothing to do with the employees or the strike or the lockout.

GC Exh. 3, p. 22. On February 5, 2015, Zimmerman responded to this request for information as follows:

> Response and Objections: Sparks objects to Request 7 as it facially seeks irrelevant information "which had nothing to do with the employees or the strike or the lockout." Subject to the foregoing objection and the General Objections above, Sparks responds that all terms and conditions of employment for bargaining unit employees are subjects of bargaining presently being negotiated with the union.

GC Exh. 3, p. 19. LoIacono testified that the Union never received any information from Sparks in response to this request (Tr. 229–230).

LoIacono testified that during the negotiating sessions he attended after the strike began—on January 8 and 20, and February 25, 2015—Sparks never stated that it had prepared a list or an order for the recall of the striking employees, or that it would return the striking employees to work at all (Tr. 181–182). On August 25, 2015, LoIacono received a copy of a letter from Steven Cetta to striking employee Adnan Nuredini (Tr. 182–183; GC Exh. 4). This letter stated that "As a result of the departure of a permanent replacement employee,"[3] Sparks was offering Nuredini "full reinstatement to a position as a waiter, effective immediately, consistent with your preferential rehire rights as an economic striker under the National Labor Relations Act" (GC Exh. 4). LoIacono wrote to Cetta that same day, requesting a copy of Sparks' preferential rehire list and information regarding its preparation, and a list of the permanent replacement employees (Tr. 183; GC Exh. 5). LoIacono also stated, "Notwithstanding the above demand, Local 342 considers all the employees who are subjects of the pending NLRB case[4] to have been illegally discharged and to be entitled to reinstatement with full back pay" (GC Exh. 5). On September 11, 2015, Faul responded to LoIacono's information request, and attached a "Preferential Rehire List" and a list of permanent replacements (GC Exh. 6). Faul sent LoIacono an amended list of permanent replacements on October 5, 2015 (GC Exh. 7). LoIacono testified that prior to September 11, 2015, he had never seen or been told of the preferential rehire list by Sparks (Tr. 186).

B. Discussion and Analysis

1. Failure to reinstate the striking employees after their unconditional offer to return to work

The complaint alleges that since on or about December 19, 2014, Sparks has failed and refused to reinstate any of the striking employees, despite their having made an unconditional offer to return to their former or substantially equivalent positions of employment on that date, in violation of Sections 8(a)(1) and (3) of the Act. Complaint ¶ 7(a-b). It is well-settled that economic strikers are entitled to immediate reinstatement to their former positions after making an unconditional offer to return to work, absent a "legitimate and substantial" business justification. *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969); *Jones Plastic & Engineering Co.,* 351 NLRB 61, 64 (2007); *Supervalu, Inc.*, 347 NLRB 404, 405 (2006). The hiring of permanent replacement employees in order for the employer to continue its business

[3] The evidence establishes that Sparks hired and reassigned employees to replace the economic strikers. Because so much of the evidence regarding the replacement employees is contested in various ways, it will be discussed infra.

[4] The charges in the instant case had already been filed.

operations prior to an unconditional offer to return to work constitutes a legitimate and substantial business justification. *Jones Plastic & Engineering Co*., 351 NLRB at 64; *Supervalu, Inc.,* 347 NLRB at 405. The burden of proving the existence of a legitimate and substantial business justification for failing to reinstate economic strikers lies with the employer. *Supervalu, Inc.,* 347 NLRB at 405, citing *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967); *Peerless Pump Co.*, 345 NLRB 371, 375 (2005). In order to satisfy this burden, the employer must provide "specific" proof that it reached a "mutual understanding" with the replacements that they were permanent employees prior to the unconditional offer to return to work. *Jones Plastic & Engineering Co.,* 351 NLRB at 64; *Consolidated Delivery & Logistics,* 337 NLRB 524, 526 (2002), enfd. 63 Fed Appx. 520 (D.C. Cir. 2003); *Towne Ford*, 327 NLRB 193, 204 (1998).

In addition, it is well settled that in the event that no vacancy in the striking employees' classifications exists, the employer is required to place them "on a nondiscriminatory recall list until a vacancy occur[s]." *Peerless Pump Co.,* 345 NLRB at 375. Subsequently, reinstatement is contingent upon the occurrence of a "genuine job vacancy" or a "Laidlaw vacancy," which is engendered when the employer expands its workforce, discharges an employee, or when an employee quits or leaves the employer.[5] *Pirelli Cable Corp*., 331 NLRB 1538, 1540 (2000), quoting *NLRB v. Delta-Macon Brick & Tile Co*., 943 F.2d 567, 572 (5th Cir. 1991). General Counsel bears the burden of establishing that a Laidlaw vacancy exists.[6] *Pirelli Cable Corp*., 331 NLRB at 1540. When such a vacancy occurs, the striking employees are entitled to full reinstatement, unless they have "acquired regular and substantially equivalent employment" or the employer proves that there were legitimate and substantial business reasons for failing to offer the striking employees reinstatement at the time. *Peerleess Pump Co.,* 345 NLRB at 375, quoting *Laidlaw Corp*., 171 NLRB at 1369–1370. Here, the Complaint alleges that since December 19, 2014, Sparks has denied the striking employees their right to be placed on a preferential hiring list, and General Counsel asserts that Sparks has failed to reinstate the striking employees to vacant positions as they have occurred. Complaint ¶ 7(c).

Sparks argues that it had permanently replaced the striking employees prior to their December 19, 2014 unconditional offer to return to work. Sparks further contends that a downturn in its business overall obviated the need for the level of waitstaff that had been employed prior to the December 10, 2014 strike. Additionally, Sparks claims that it had been "overstaffed" in the past due to the striking employees' lack of reliability, which required a larger group of employees to cover during unanticipated absences. Sparks asserts that it therefore had fewer available waitstaff and bartender positions after the strike, and thus a legitimate business justification for refusing to reinstate the striking employees.

Sparks and General Counsel base their contentions regarding the pre-strike employee complement and existing Laidlaw vacancies after the December 19, 2014 unconditional offer on different types of records created by Sparks in the ordinary course of its operations, and dispute the documents' probative value accordingly. General Counsel argues that Weekly Tip records—spreadsheets recording the weekly tips of all employees—most accurately reflect Sparks' complement of waistaff and bartenders at any given point in time (GC Posthearing Br. p. 23). Sparks asserts that Daily Tip records—handwritten notes of tip calculations made on a daily basis—more accurately depict the staffing needs of the restaurant, in that they record how many employees worked each day (RS Posthearing Br. at p. 37). I find that the Weekly Tip records more accurately reflect the overall number of Sparks' waitstaff and bartender employees for any particular period. The Daily Tip records only indicate the employees working any particular day and shift, and thus do not establish the full complement of Sparks employees.[7] Because every Sparks employee does not work every single shift, the Daily Tip records do not encompass the entire workforce. The Weekly Tip records, by contrast, list every waiter and bartender employed by Sparks, regardless of the individual days they worked during the week in question.

In addition, the Daily Tip sheets produced by Respondent and submitted into evidence were not complete, and were not provided for critical time periods. For example, the one week of Daily Tip sheets in September, November, and December 2014 Sparks submitted for the purposes of comparison with Weekly Tip records submitted by General Counsel were actually Daily Tip sheets for September, November, and December 2013. (RS Exh. 25.) The December 1, 2014, through December 6, 2014 Daily Tip sheets were included elsewhere in the record (RS Exh. 8), but not the Daily Tip sheets for the comparator weeks in September and November. Therefore, it is not apparent that Sparks' records submitted for these weeks provide a comprehensive and reliable reflection of the waitstaff and bartenders employed during the stated periods. As a result, the Weekly Tip records provide a more comprehensive account of Sparks'

[5] Temporary transfers of employees, by contrast, do not create a *Laidlaw* vacancy. *Pirelli Cable Corp.*, 331 NLRB at 1540.

[6] General Counsel contends that under *Kurz-Kasch, Inc.*, 301 NLRB 946, 949 (1991), a decline in the employer's workforce below prestrike levels "creates the presumption that vacancies existed," which can be rebutted by proof on the employer's part of "substantial and legitimate business reasons" for the existing number of employees. However, that analysis was part of the decision of the Sixth Circuit remanding the case. *Kurz-Kasch, Inc.*, 301 NLRB at 946, 948–949; *Kurz-Kasch, Inc. v. NLRB*, 865 F.2d 757 (6th Cir. 1989). Thus, while the Sixth Circuit's burden-shifting analysis constituted the law of that particular case, it has not been subsequently applied with any degree of uniformity. I note that the Sixth Circuit's analysis in *Kurz-Kasch, Inc.* was cited at length by the ALJ in *Laidlaw Waste Systems*, but the Board did not discuss it in upholding her decision. See *Laidlaw Waste Systems*, 313 NLRB 680, 680–682 fns. 3, 7, and at 694 (1994).

[7] The case of Sparks waiter Joanna is illustrative. Edelstein testified at the hearing that Joanna was out of work on an extended medical leave, and her name was therefore redacted from the Daily Tip record (Tr. 530–531; RS Exh. 8). However, during her testimony Edelstein also stated that Joanna was still an employee of Sparks, regardless of her having been removed from the Daily Tip record, and her name appears on the Weekly Tip record (Tr. 536-539; GC Exh. 13(b)). This evidence indicates that the Daily Tip record does not contain a complete record of Sparks' waiters and bartenders during the pertinent periods.

waitstaff and bartender employees overall.

Furthermore, the evidence does not support Sparks' contention that it kept an inflated roster of employees prior to the strike, which was no longer necessary because the replacement employees were more reliable. Sparks argues in its Post-Hearing Brief that the employees who participated in the strike called out of work and took time off "at their discretion," forcing Respondent to rely on "backup" workers which were no longer necessary after the replacement employees began (RS Posthearing Br. at p. 38–39). Sparks therefore contends that the total number of waiters and bartenders employed prior to the strike was artificially inflated, and is not probative with respect to the ultimate number of Laidlaw vacancies which existed subsequently. However, the record establishes that, as Sparks states in its Posthearing brief, "Sparks daily staffing needs fluctuate throughout the year" (RS Posthearing Br. at 40). The record evidence in the form of credible employee testimony further establishes that Sparks' practice in the past was to allow employees to take extended vacations or other forms of time off during periods which were not as busy, as opposed to laying them off (Tr. 41–42, 117–118, 160–161). For example, waiter Valjon Hajdini credibly testified that he began his employment with Sparks in September 2008, and worked about 42 hours per week—six dinners and one lunch—until the December 10, 2014 strike (Tr. 26). During this time he observed that while more employees were hired immediately before the busy season, during the slower season not a single employee was terminated (Tr. 41–42). Instead, the roster of employees simply rotated days of work, and employees took longer vacations or time off (Tr. 41–42). Hajdini testified that more employees were hired every fall only because some employees left Sparks for better jobs, became ill, or were fired, creating a shortage of staff prior to the busier months (Tr. 42). Waiter Kristopher Fuller similarly testified that since the inception of his employment with Sparks in 2007 employees were kept on from the busy period into the slower period, and the only turnover that occurred happened naturally as employees left for better jobs or were fired (Tr. 120–122). Bartender Elvi Hoxhaj also testified that during the 12 years he was employed by Sparks, employees were never laid off during the slower months (Tr. 152). Based on his observations, Hoxhaj testified that the available work was distributed evenly, so that each waitstaff employee worked 4 or 5 days per week rather than 6, or the employees each took longer vacations. Hoxhaj stated that he only witnessed employees leave their employment with Sparks when they were discharged or "because of personal reasons" (Tr. 160–161). Sparks offered no explanation for its departure from this practice after the inception of the strike. Thus, I am not persuaded by its contention that its prestrike employee complement was artificially enlarged, and therefore not useful to determine the existence of Laidlaw vacancies.

Sparks' Weekly Tip records establish that the restaurant employed a total of 46 waiters and bartenders immediately prior to December 10, 2014 (GC Exh. 13(b)).[8] The payroll for the period immediately after the strike began (December 15 through 21, 2014) lists a total of 37 waiters and bartenders (GC Exh. 16).[9] Therefore, the record establishes that from the inception of the strike on December 10, 2014, and through the time of the striking employees' unconditional offer to return to work on December 19, 2014, there were at least 9 vacant waiter/bartender positions.

Respondent contends that it did not return the striking employees to work after their unconditional offer to return for substantial and legitimate business reasons. First, Sparks asserts that it hired permanent replacements for the striking employees prior to their unconditional offer to return to work on December 19. Sparks further argues that a downturn in its overall business obviated the need for the amount of waiters and bartenders it had previously employed, thereby justifying its refusal to reinstate the striking employees. As discussed above, the employer bears the burden of proving the existence of a legitimate and substantial business justification for failing to reinstate economic strikers following an unconditional offer to return to work. *Supervalu, Inc.,* 347 NLRB at 405; *Peerless Pump Co*., 345 NLRB at 375. For the following reasons, I find that Sparks has failed to satisfy this standard.

In order to establish that economic strikers were not returned to work after an unconditional offer because their positions had already been filled by permanent replacements, the employer must present "specific" proof of having reached a "mutual understanding" with the replacements to that effect. *Jones Plastic & Engineering Co.*, 351 NLRB at 64; *Consolidated Delivery & Logistics*, 337 NLRB at 526. Thus, the employer must present evidence that the circumstances of the replacement employees' hiring show that the replacements "were regarded by themselves and [the employer] as having received their jobs on a permanent basis." *Consolidated Delivery & Logistics,* 337 NLRB at 526, quoting *Target Rock Corp.,* 324 NLRB 373 (1997), enfd. 173 F.3d 921 (D.C. Cir. 1998). Evidence of the employer's intent to hire the replacements on a permanent basis is insufficient. *Consolidated Delivery & Logistics*, 337 NLRB at 526. Furthermore, evidence of an offer of work on a permanent basis is inadequate absent a showing that the replacement employee accepted the offer prior to the striking employees' unconditional offer to return to work. *Choctaw Maid Farms, Inc.,* 308 NLRB 521, 527–528 (1992), citing *Solar Turbines,* 302 NLRB 14 (1991), affd. sub nom. *Machinists v. NLRB*, 8 F.3d 27 (9th Cir. 1993) (employer's statement to replacements that they "had a job" insufficient to establish hiring on a permanent basis without evidence that replacements accepted offer).

The evidence establishes that Sparks obtained replacement employees via three different methods. Six kitchen employees

[8] The payroll for this period contains only 45 waiters and bartenders, because Joanna did not work and therefore was not paid (GC Exh. 13(d)).

[9] There were no Weekly Tip records produced for this or any other week until the week of January 19 through 24, 2015. Information was therefore culled from both the Weekly Tip records (which constitute the most accurate reflection of the roster of employees) and the payroll records (reflecting the wages actually paid for a given week) to establish that there were 46 employees immediately prior to the strike and 37 immediately thereafter.

were reassigned to waitstaff positions,[10] five purportedly "seasonal" employees hired before the strike began became replacements, and 23 replacement employees were hired directly after the strike began. The available evidence establishes that Sparks used similar documents when it hired or reassigned these employees to permanent replacement positions, and Sparks contends that these employees thereby constituted permanent replacements for the economic strikers prior to the unconditional offer to return to work on December 19, 2014. In particular, the replacement employees were provided with a letter stating as follows:

> It is a pleasure to extend to you an offer of employment in a permanent position as Waiter [Bartender], for Michael Cetta, Inc. dba Sparks Steak House.
>
> Your start date will be December 15, 2014. Your compensation will be paid based on a weekly basis (52 pay period per year) of $8.00/hour (less tip credit) and applicable tips.
>
> Eligibility for medical insurance benefits will begin following ninety (90) days of continued employment. The Company's employee benefits programs are described under separate cover, and the terms of the official plan documents govern all issues of eligibility and benefits, in the event of a conflict between the contents of this letter and the terms of the plan documents.
>
> Based on the Company's time-off policies, employees become eligible for paid time off as explained fully in our employee handbook. If the Company develops other benefit programs for which you may be eligible, the Company will advise you accordingly. The Company reserves the right to modify, supplement, and discontinue all employee benefits programs in its sole discretion.
>
> In accordance with the Immigration Reform and Control Act, we are required to verify that you are legally entitled to work in the United States. You will be required to complete an I-9 form on your first day of employment, and present original documents establishing identity and employment eligibility.
>
> This offer is not a contract for employment; your employment is "at-will" and may be terminated at any time for any reason by you or Michael Cetta, Inc.
>
> Congratulations on your new position! We are very excited to have you join our organization, and we are sure that you will be a valuable addition to Sparks Steak House. Please do not hesitate to call me at 212.687.4806 should you have any questions.
>
> Sincerely,
> Shailesh Desai

RS Exh. 7(a-hh). These letters were signed by both Desai and all but one were signed by the individual employees. All of the letters contained typewritten dates across the top preceding the text. Two of the letters were dated December 11, 2014, 26 were dated December 15, and six were dated December 19.[11] The letters were signed by the replacement employees, but the signatures were not dated.

Again, it is Sparks' burden to establish that it reached a mutual understanding with these employees regarding their status as permanent replacements for the economic strikers prior to 4 p.m. on December 19, 2014, when the unconditional offer to return to work was made. I find that the evidence adduced by Sparks to attempt to elucidate the understanding it reached with the replacement employees, and the time at which the agreement regarding their employment status was arrived at, is insufficient to do so. Sparks did not call any of the replacement employees to testify regarding the process by which they were hired or reassigned, and their understanding regarding the nature of their employment thereafter. Edelstein testified that she was responsible for finding, interviewing, and "going through the process of hiring waiters" on December 11, 2014 (Tr. 419).[12] She testified that she "contacted staffing agencies" and sought referrals from Sparks' current staff, and that she "did a series of many, many, many interviews in the course of the day," ultimately offering positions to prospective employees (Tr. 419). She was not asked for and did not provide any additional information about her interactions with candidates during the interviews. According to Edelstein, this process began on December 11, 2014, and continued "over the course of a few days," but she could not recall with any more specificity how long the process took, or how many replacement employees were hired (Tr. 419–420).

Edelstein was no more detailed with respect to the letters offering permanent replacement positions, and their distribution, signature, and return. Edelstein testified that she and Desai prepared the letters offering permanent employment[13] (Tr. 421; RS Exh. 7(a-hh)). She further testified that she handed the letters to replacement employee candidates (Tr. 423–424). However, she did not witness their signatures on the letters, and did not know whether the replacement employees signed the

[10] These employees had been employed by Sparks in kitchen positions for some time prior to being reassigned to waitstaff work. See GC Exh. 6 and 7; Tr. 264–265. Because the evidence establishes that Sparks hired new employees to replace the kitchen workers who were transferred into waitstaff positions, the waitstaff positions into which they transferred constituted *Laidlaw* vacancies. GC Exh. 14 and 23(B). See *Pirelli Cable Corp.*, 331 NLRB at 1540; *K-D Lamp Co.*, 229 NLRB 648, 650 (1977).

[11] The alleged "seasonal employees" were given two offer letters. The first, distributed in October and November 2014 depending upon the employee, begins, "It is a pleasure to extend you an offer of seasonal employment as a Waiter for Michael Cetta, Inc. dba Sparks Steak House. Your start date will be DATE. Your compensation will be paid on a weekly basis (52 pay periods a year) of $8.00/hour (less tip credit) and applicable tips." [R.S. Exh. 6(a-d)] There is no end date or time period for employment specified in the letter. Furthermore, the evidence establishes that prior to the December 10, 2014 strike Sparks had never hired employees on a seasonal basis whose employment terminated after the busiest months. Instead, the evidence establishes that employees hired from October to December were always maintained on the roster and allowed to take vacation or unpaid time off as business slowed.

[12] Edelstein testified that she was not at Sparks on December 10, 2014, when the strike began (Tr. 418–419).

[13] Desai testified on behalf of Sparks, but was not questioned regarding the offer letters or his involvement in the interview and hiring process.

letters on the date that, presumably, either she or Desai placed at the top of the text (Tr. 424, 534–535; R.S. Exh. 7(a-hh)). Nor could she testify with any specificity regarding when the individual letters were returned with the replacement employees' signatures. Her testimony regarding the receipt of the signed offer letters comprising Respondent's Exhibit 7 was nebulous and significantly equivocal:

> Q: And do you recall the last day that you received any of these documents returned to you?
>
> A: I know that the last person – I don't it. It was – you know, whenever it was issued, it was within a day or so that we got them back. So whenever the last one was issued is when I got it back. I don't know the exact last day. I think it was – let me just take – can I just look at something?
>
> Q: Sure.
>
> A: Thanks.
>
> (The witness examined the document.)
>
> THE WITNESS: It was – I believe it was the 19th of December. The last day that we got this one – these back.
>
> Tr. 426.

I simply do not find Edelstein's testimony regarding the hiring process and the offer letters probative. She provided virtually no information regarding her interactions with the replacement employee candidates, which would elucidate whether and when a mutual understanding regarding their employment status arose. Although Edelstein's testimony ostensibly encompassed all of the offer letters—including those provided to the reassigned kitchen workers and the "seasonal" employees—her narrative testimony appeared to pertain solely to the newly hired replacement employees, and not to either of the former groups.[14] Her testimony regarding when Sparks received the offer letters signed by the replacement employees was vague and equivocal. In particular, I note that the list of permanent replacement employees provided to LoIacono on September 11, 2015, contains hiring dates for the replacement employees at odds with the dates of the offer letters (GC Exh. 6; R.S. Exhs. 7(a-hh)). And because several of the offer letters are dated December 19, 2014, if Sparks received them signed by the employee "within a day or so," it is doubtful that all of the offer letters were received with employee signatures as of that date, as Edelstein claims (RS Exhs. 7(l, m, x, aa, bb, hh)).

Furthermore, the available payroll records do not illuminate the situation. For example, four of the six ostensibly reassigned kitchen employees and all 23 of the newly hired replacement employees appear on the payroll as waitstaff for the period December 15 through 21, 2014. However, the payroll evidence does not establish the date that the newly hired employees began working, or that the kitchen employees began working as waitstaff, with any further specificity (GC Exh. 16; Tr. 300–301). Furthermore, one of the former kitchen employees first appears as waitstaff on the payroll for the period December 22 through 28, 2014, and another does not appear as waitstaff on the payroll until the period January 5 through 11, 2015, well after the unconditional offer to return to work (GC Exh. 18 and 20). In addition, Daily Tip sheets and Weekly Tip records which would have established the precise dates that the newly hired employees began working and that former kitchen employees worked as waitstaff by virtue of their receipt of tips were not produced by Respondent. As a result, the available documentary evidence does not establish that the former kitchen workers and the 23 newly hired employees constituted permanent replacements for the striking waitstaff and bar tenders prior to the unconditional offer to return to work on December 19, 2014.

General Counsel asserts that an adverse inference should be drawn based upon Sparks' failure to produce documents—in particular Weekly and Daily Tip records–which would have shown the exact date that the kitchen workers and newly hired replacements began working as waitstaff and bartenders during the period from December 15 through 19, 2014. General Counsel also asks that I draw an adverse inference based on Sparks' failure to call as a witness manager Ricardo Cordero, who signed the letters offering "seasonal" employment and hired Jonathan Sturms in February 2015. For the following reasons, I find that such adverse inferences are appropriate.

Succinctly stated, the adverse inference rule consists of the principle that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Auto Workers v. NLRB*, 459 F.2d 1329, 1335–1336 (D.C. Cir. 1972) (describing the adverse inference rule as "more a product of common sense than of the common law"); see also *Metro-West Ambulance Service, Inc.,* 360 NLRB No. 124 at p. 2–3 and at fn. 13 (2014); *SKC Electric,* 350 NLRB 857, 872 (2007). An adverse inference may be drawn based upon a party's failure to call a witness within its control having particular knowledge of the facts pertinent to an aspect of the case. See *Chipotle Services, LLC,* 363 NLRB No. 37, p. 1, fn. 1, p. 13 (2015) (adverse inference is particularly warranted where uncalled witness is an agent of the party in question); *SKC Electric, Inc*., 350 NLRB at 872–873. An adverse inference may also be drawn based upon a party's failure to introduce into evidence documents containing information directly bearing on a material issue. See *Metro-West Ambulance Service, Inc*., 360 NLRB No. 124 at p. 2–3 (failure to produce subpoenaed accident reports pertinent to the "treatment of similarly situated employees" warrants adverse inference that records would have established that such employees were treated more leniently than discriminatee); *Massey Energy Co*., 358 NLRB 1643, 1692, fn. 63 (2012); see also *Zapex Corp.,* 235 NLRB 1237, 1239 (1978).

The adverse inference rule does not require that the party seeking the adverse inference have sought the witness testimony or documents via subpoena. *Auto Workers v. NLRB*, 459 F.2d at 1338 (applicability of the adverse inference rule "in no way depends on the existence of a subpoena compelling production of the evidence in question"). However, where a subpoena applicable to the particular witness or documentary evidence in question has been served, the rationale for drawing an

[14] The only evidence regarding the reassignment of the kitchen employees is Steve Cetta's testimony that their reassignment to waitstaff positions took place after December 10, 2014 (Tr. 264–265).

adverse inference is strengthened. *Auto Workers v. NLRB*, 459 F.2d at 1338 ("the willingness of a party to defy a subpoena in order to suppress the evidence strengthens the force of the preexisting inference"); *People's Transportation Service, Inc.,* 276 NLRB 169, 223 (1985). An adverse inference has been deployed as a discovery sanction in such cases. See, e.g., *McAllister Towing & Transportation Co*., 341 NLRB 394, 396 (2004), enfd. 156 FedAppx. 386 (2d Cir. 2005).

In the instant case, Sparks failed to produce or enter into evidence either Weekly or Daily Tip records for one of the most significant weeks in question, December 15 through 21, 2014. Such records, by establishing any shifts worked by alleged replacement employees, would tend to substantiate Respondent's claim that the striking employees were permanently replaced prior to their unconditional offer to return on December 19 at 4 p.m. Not only were such records subpoenaed by General Counsel, but I denied Sparks' petition to revoke and ordered the production of these documents on October 1, 2015. Although Sparks subsequently produced copious documents involving employee payroll and tips for 5 years dating back to January 2010, it failed to introduce evidence with regard to this critical week. Furthermore, there was no indication from Sparks' witnesses that such documents had not been created or maintained in the ordinary course of its business. Edelstein testified that Weekly Lunch and Dinner Tip records (GC Exh. 13(b)) are kept for every week the restaurant is open (Tr. 294, 321). She also testified that it would be impossible to determine, from the payroll records alone, what day of any given week an employee worked (Tr. 300–303). Cetta stated in his testimony that schedules such as the dinner schedule in evidence as GeneralCounsel Exhibit 13(a) are kept in the ordinary course of business for every week the restaurant is open (Tr. 266). Sparks entered into a similar stipulation with respect to Weekly Tip records (GC Exh. 13(b)), and employee hours summaries (GC Exh. 13(c)) (Tr. 284). Because there was no documentary or testimonial evidence to elucidate the specific date that replacement employees signed and returned their offer letters, or the date on which a mutual understanding that employees were permanent replacements was reached, evidence establishing the specific dates of employment during the period December 15 through 21 was critical. Yet Sparks failed to produce records having a direct probative bearing on this issue, records which were admittedly made and kept in the ordinary course of its business, despite my order denying the Petition to Revoke and requiring that they do so. Such a course of events militates in favor of drawing an adverse inference to the effect that if the records in question had been produced, they would not have established that reassigned kitchen employees and newly hired replacements employees were performing waitstaff and bartending work prior to the unconditional offer to return to work on December 19. See *Zapex Corp*., 235 NLRB at 1239 (failure to produce personnel files of alleged permanent replacement employees warrants inference that records would have tended to show that replacements were not in fact permanent).

I further find it appropriate to draw an adverse inference based on Sparks' failure to call its Manager Ricardo Cordero as a witness.[15] As discussed above, Cordero was both the signatory to the seasonal offer letters and the manager who hired Jonathan Sturms in February 2015. Edelstein testified that she created the "seasonal employment offer" template used by Cordero and signed by him[16] (Tr. 411–413; RS Exh. 6(a)-(d)). As a result, Cordero would most likely have had information regarding the understanding between the "seasonal" hires and Sparks prior to their allegedly obtaining a permanent replacement position. Edelstein testified that she only interviewed one of the five alleged "seasonal employees," Luis Calle, whose offer letter was never signed and returned (Tr. 416–418). Edelstein further testified that she did not recall giving the seasonal employment letters to employees Andrew Globus, Mostafa Belabez, Luis Vasconez, or Anass Kesley (Tr. 463; RS Exh. 6(a)-(d)). As Cordero's signature was on the offer letters for these four "seasonal" employees, his testimony would have illuminated the status of their employment. Testimony could have also been elicited regarding his general experience in hiring for Sparks as related to positions of "seasonal employment." For example, some of the "seasonal" offer letters contain dated signatures, indicating that this process differed from the hiring and reassignment process for the alleged permanent replacement employees in December (RS Exh. 6(a, b, d)). Thus I find it appropriate to infer that had Cordero testified, his testimony would not have supported a finding that the "seasonal" employees' understanding regarding their status was consistent with that of a legitimate permanent replacement.

I also find it appropriate to draw an adverse inference based upon Sparks' failure to call Cordero given Cordero's hiring of employee Jonathan Sturms in February 2015. Although Edelstein testified that Cordero hired Sturms without the proper authorization, her testimony was inconsistent on this point (Tr. 427). Edelstein initially contended that Sparks changed the process for hiring after the strike, and that she explained the new procedures, which required Steve Cetta's specific approval for hiring staff, at a management meeting (Tr. 473–474, 476). According to Edelstein, the managers responded, "we need people, what do we do? What do we do?" She testified that she responded by attempting to "alleviate their anxiety and stress about what was going on," and to "help them understand that we understand that we are short waiters or we need people or whatever it is, we understand" (Tr. 478). However, Edelstein and Cetta then purportedly discharged Sturms after discovering that Cordero had hired him without consulting Cetta, in violation of this policy, because, "No one should have been hired" and "We didn't need anybody" (Tr. 502–505). When questioned further regarding why Strums was hired if Sparks did not need additional help, Edelstein claimed that Cordero apologized, saying he had made a mistake (Tr. 555–556). Thus, Cordero's testimony regarding how the hiring of Sturms came

[15] Cetta testified that Ricardo Cordero was still employed by Sparks as a manager at the time of the hearing (Tr. 244).

[16] Desai testified that he signed offer letters in fall 2014 in anticipation of the busy season at Sparks, but his signature does not appear on the "seasonal" offer letters (Tr. 649–650). This leads me to conclude that in his testimony he was referring to offer letters he gave to the former kitchen workers, the other newly hired replacements, or to the "seasonal" employees in mid-December 2014.

about—whether Sparks was actually "short waiters" or whether Sturms' hiring was a "mistake" because Respondent "didn't need anybody"—would have been illuminating. I thus find that Sparks' failure to call Cordero to testify regarding the hiring of Sturms warrants an adverse inference that Cordero's testimony would not have supported Sparks' contentions regarding these issues.

The record evidence establishes additional Laidlaw vacancies, as identified by General Counsel. For example, General Counsel contends that the replacement employees Andreas Zenteno, Freddy Guzhnay, Carlos "Alex" Ruiz, and Maximillian Vainshtub left Sparks sometime between December 22, 2014, and January 18, 2015, creating Laidlaw vacancies that Sparks did not recall striking employees to fill (GC Br. 34–35). Edelstein confirmed this in her testimony (Tr. 328–335). General Counsel further contends that a striking employee should have been recalled to work when waiter Helene DeLillo left Sparks' employment on or before January 4, 2015. Edelstein confirmed in her testimony that DeLillo did not appear on or after the January 5–11, 2015 payroll (GC Exh. 20; Tr. 325, 327, 331). Sparks adduced no evidence as to why DeLillo's position or the four others identified above were not offered to striking employees, other than general arguments regarding overstaffing and seasonality which I am rejecting herein. I therefore find that departure of Zenteno, Guzhnay, Ruiz, Vainshtub, and DeLillo created Laidlaw vacancies, to which Sparks was obligated to respond by offering these positions to striking employees. I further find that because there is no evidence that DeLillo was hired as a permanent replacement prior to the unconditional offer to return to work, her position should have been made available to a striking employee upon the unconditional offer to return to work on December 19, 2014.

Sparks further claims that a downturn in its business necessitated a smaller staff, so that its failure to recall the striking employees after their unconditional offer to return to work can be justified on this basis. The evidence adduced at the hearing, however, does not satisfy Sparks' burden to prove that strained financial circumstances obviated the need for what had previously been a full complement of employees, either at the time of the unconditional return to work or thereafter.

First of all, it is undisputed that December is the busiest month of the year at Sparks due to holiday parties and celebrations. Financial records introduced into evidence establish that, as is typical, December 2014 was the month of that year with Sparks' highest sales (Tr. 646–648, G.C. Appendix A, and RS Exh. 16). Thus, the December 10, 2014 strike and December 19, 2014 unconditional offer to return to work took place during the time that Sparks did its highest volume of business for the year. It is also undisputed that Sparks transferred kitchen workers and hired employees to work in lieu of the striking employees, both during this time and thereafter. There is no question that Sparks did so out of necessity. As Edelstein testified, when she met with management personnel after the strike began and told them that all new hires in the future must be approved by Cetta, the managers responded, "we need people, what do we do? What do we do?" (Tr. 478). Edelstein testified that her response attempted "to not only alleviate their anxiety and stress about what was going on, but to help them understand that we understand that we are short waiters or we need people" (Tr. 478). Furthermore, although December is the busiest month of the year for Sparks, the "slow" season takes place over the summer, and not in January and February (Tr. 41, 115, 645–646; GC Appendix A). Thus, while Sparks' financial records establish that its total gross profit declined from December 2013/January 2014 to December 2014/January 2015, the restaurant was still at the height of its busy season when the strike and unconditional offer to return to work took place, and had not yet entered its slowest season when striking employees were not recalled to replace employees whose employment terminated in early 2015.

Furthermore, the evidence establishes, as General Counsel argues, that the decline in sales which Sparks experienced from December 2014 to January 2015 was not as drastic as Sparks contends. The documentary evidence establishes that over the past five years the December 2014 to January 2015 decline is actually the second smallest decline for that period (GC Appendix A; RS Exh. 16). And, as discussed above, the evidence establishes that Sparks has never before laid off waitstaff and bartenders, even during its slow season over the summer. Instead, these employees remained employed, taking long vacations or leaves of absence and dividing the available work. The evidence does not support any reason for Sparks' departure from this practice, even during periods of larger or more dramatic declines in business from December of one year to January of the next. See *Kurz-Kasch, Inc.*, 301 NLRB 946, n. 3, 951 fn. 6 (evidence did not establish previously-existing practice of temporarily shifting employees, which Respondent contended obviated the necessity of recalling striking employees); *Austin Powder Co.*, 141 NLRB 183, 186 (1963), enfd. 350 F.2d 973 (6th Cir. 1965) (Respondent's claim that economic decline necessitated layoffs was suspect, where it did not discharge employees at a different plant which suffered a similar decline in business). I further note that there is no evidence that Sparks took other steps to address purported issues of overstaffing caused by the decline in business, such as transferring the former kitchen workers back to their previous positions.[17] Therefore Sparks' attempt to justify its refusal to recall the striking employees to work on this basis is not persuasive.

The cases cited by Sparks in support of its defense that a decline in its business constituted a substantial business justification for failing to return the striking employees to work as vacancies arose are inapposite. For example, in *Providence Medical Center*, 243 NLRB 714, 738–739 (1979), the workload in the laboratory where the striking technologists were employed was reduced due to the simultaneous strike of a separate bargaining unit of nurses at the Respondent hospital, and Respondent hired only one short-term laboratory employee during the 2½ months after both strikes concluded. Similarly, in *Bushnell's Kitchens, Inc.,* 222 NLRB 110, 117 (1979), the em-

[17] This is particularly the case given that, as General Counsel argues and calculations based on payroll records confirm, kitchen workers ultimately "cost" Sparks 4.5 times more in payroll than waitstaff and bartenders, because Sparks is ineligible for a tip credit with respect to the kitchen workers. See RS Exhs. 15, 17; GC Posthearing Br. at p. 46, fn. 33.

ployer hired no replacement employees during the strike in question, employees responsible for sales instead performed production work during the strike resulting in a decline in orders, and an OSHA inspector ordered the employer to cease using certain production equipment. In *William O. McKay Co.*, 204 NLRB 388, 389, 393 (1973), Respondent reduced its overall workforce by almost forty percent (from 100 to 65 employees) during the year before the strike began. Finally, in *Colour IV Corp.,* 202 NLRB 44, 44–45 (1973), the Board found that the striking employee not returned to work lacked the qualifications Respondent required for the poststrike work available. As a result, I find that these cases are not analogous to the circumstances at issue here.

For all of the foregoing reasons, I find that Sparks has failed to establish that an economic decline constituted a legitimate and substantial business justification for failing to reinstate the striking employees.

Finally, I find that Sparks has offered shifting rationales for its refusal to reinstate the striking employees after their December 19, 2014 unconditional offer to return to work that render its various explanations suspect. In December 2014, Sparks was contending that picket line misconduct constituted its sole reason for failing to reinstate the striking employees. Zimmerman's December 22, 2014 email declining to reinstate the striking employees provides only this justification, asserting that they engaged in "violence, threats," "intimidation," "destruction of property and trespass." Nowhere does Zimmerman mention that permanent replacement employees had been hired prior to the striking employees' unconditional offer, or that an economic downturn of some sort had eliminated the need for the previous complement of waitstaff and bartender employees. At the January 8, 2015 negotiating session Zimmerman continued to insist that he could not return the striking employees to work because he was "protecting Sparks property." I further note that Sparks did not provide any information in response to Local 342's request for information pertaining to the incidents of, according to Zimmerman, "violence, threats and intimidation . . . destruction of property and trespass" that purportedly engendered Sparks' decision to refuse to reinstate the striking employees. The evidence establishes that on January 9, 2015, Local 342 requested "any evidence and/or videos . . . to support the employer's representative's response to the Union's unconditional return to work," namely the assertion that Zimmerman "was protecting his client's property due to incidents that took place at Sparks" which the Union contended were not caused by the strike or the striking employees (GC Exh. 3, p. 22). It is well settled that the Board considers such information to be necessary for a Union's performance of its duties as bargaining representative. See, e.g., *NTN Bower Corp*., 356 NLRB 1072, 1139 (2011); *Page Litho, Inc.,* 311 NLRB 881, 891 (1993). Zimmerman's response that the requested information was "irrelevant" based upon the Union's contention that its activities and those of the striking employees were not responsible for any alleged incidents is legalistic circumlocution, as is his assertion that "all terms and conditions for bargaining unit employees are . . . presently being negotiated" (GC Exh. 3, p. 19). Thus, the evidence establishes that Sparks never provided anything to the Union in order to substantiate its contention that "violence, threats and intimidation . . . destruction of property and trespass" justified the its refusal to reinstate the striking employees. Now in its Posthearing Brief, Sparks has abandoned its picket line misconduct argument, and contends that the permanent replacement of the striking employees and an economic downturn constitute its legitimate business justifications for declining to offer reinstatement. I find that the shifting explanations asserted by Sparks at the time of the unconditional offer and January 2015 negotiating sessions, the hearing in this matter, and its Posthearing Brief militate against crediting any one as a legitimate and substantial business justification for failing to reinstate the striking employees.

For all of the foregoing reasons, I find that since December 19, 2014, Sparks has failed and refused to reinstate the striking employees, despite their having made an unconditional offer to return to work on that date, in violation of Sections 8(a)(1) and (3) of the Act. I further find that Sparks violated Sections 8(a)(1) and (3) by failing to reinstate the striking employees to vacant waitstaff and bartender positions as they have occurred.[18]

2. The preferential hiring list

The complaint alleges at Paragraph 7(c) that Sparks violated Sections 8(a)(1) and (3) of the Act by failing and refusing to place the striking employees on a preferential hiring list. It is well settled that economic strikers making an unconditional offer to return to work at a time when their positions are filled by permanent replacements remain employees, and "are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantial equivalent employment." *Laidlaw Corp.,* 171 NLRB at 1369–1370. To this end, the employer must maintain a "nondiscriminatory recall list" such that when openings become available, "the unreinstated striker could be recalled to his or her former or substantially equivalent position*."* *Peerless Pump Co*., 345 NLRB at 375. The burden of offering reinstatement in this context rests with the employer; strikers and the union are not required to approach the employer regarding available positions. *Laidlaw Corp*., 171 NLRB at 1369; see also *Alaska Pulp Corp*., 326 NLRB 522, 528 (1998) (employer required to "seek out strikers as their prestrike or substantially equivalent positions become available to offer reinstatement").

The evidence here fails to establish that Sparks created or maintained a preferential hiring list prior to September 11, 2015, when it provided a seniority list it was purportedly using as a preferential hiring list to the Union in response to the Union's information request (GC Exhs. 5–7; Tr. 186). Sparks argues in its Posthearing Brief that it had no obligation to inform the economic strikers or the Union that permanent replacement employees had been hired, citing *Avery Heights*, 343 NLRB 1301, 1305–1306 (2004), vacated and remanded on other grounds, 448 F.3d 189, 195 (2nd Cir. 2006).[19] That case,

[18] The precise number of *Laidlaw* vacancies to which economic strikers should have been reinstated is a matter for compliance. *Chicago Tribune Co.*, 304 NLRB 259, 277–278 (1991); *Concrete Pipe & Products Corp.*, 305 NLRB 152, 154 fn. 9 (1991).

[19] The Second Circuit upheld the Board's determination that the employer in *Avery Heights* was not required to inform the employees or

however, addressed an employer's refusal to disclose its intention or plan to hire permanent replacement employees; the employer there informed the union that it was hiring permanent replacement employees two weeks after the hiring began. *Avery Heights*, 343 NLRB at 1306–1307. Here, by contrast, Sparks declined for months to inform the Union regarding its hiring of permanent replacement employees and the existence of any preferential hiring list. It pursued this course despite the Union's reiteration of its unconditional offer to return to work at the January 8, 2015 negotiating session, the Union's subsequent request for information regarding Sparks' rationale for refusing to reinstate the striking employees, and subsequent bargaining sessions (on February 25 and March 20, 2015,[20] for example). Furthermore, the evidence as discussed above establishes that Sparks not only hired replacement employees, but continued to do so through February 2015 (when it hired Sturms) without informing the Union or the striking employees. I also note that, if Sparks had truly eliminated waitstaff and bartender positions for legitimate business reasons such as a financial decline, the failure to notify the Union "tends to militate against Respondent's good faith in dealing with the strikers." *Transport Service Co*., 302 NLRB 22, 29 (1991). As a result, the evidence establishes that Sparks failed to satisfy its obligation to create and implement a preferential hiring list with respect to the striking employees.

Sparks further argues that it discharged its duty to create and maintain a preferential hiring list when it notified the Board Agent by letter of March 5, 2015, that the economic strikers had been permanently replaced.[21] I disagree. First of all, it is baffling that Sparks would provide this information to the Board Agent during the course of the investigation without providing it to the Union, with whom it was interacting at least once per month for contract negotiations. Notice provided to a Board Agent during the investigation of an unfair labor practice charge does not constitute notice to the Union or the striking employees. Furthermore, in the March 5, 2015 letter itself, Sparks attempts to turn the evidentiary burdens in this area on their head by complaining that the Union had not actively sought bargaining regarding returning the striking employees to work. As the above-described caselaw makes clear, the onus for creating the preferential hiring list and making offers of reinstatement to economic strikers falls on the employer.

For all of the foregoing reasons, I find that Sparks failed to and refused to place the striking employees on a preferential hiring list in violation of Sections 8(a)(1) and (3) of the Act.

3. The alleged discharge of the strikers

The complaint further alleges at Paragraph 7(d) that Respondent violated Sections 8(a)(1) and (3) of the Act by discharging the striking employees on December 22, 2014. See *Tri-State Wholesale Bldg. Supplies, Inc.,* 362 NLRB No. 85 at p. 1, fn. 1, p. 5 (2015) (enfd. 2016 WL 4245468 (6th Cir. 2016)); *Pride Care Ambulance*, 356 NLRB No. 128 at p. 1–3 (2011). General Counsel contends that on December 22, 2014, Sparks violated Sections 8(a)(1) and (3) by discharging the striking employees via Zimmerman's email to O'Leary. In order to determine whether a striker has been discharged, the Board evaluates whether the employer's statements and actions "would logically lead a prudent person to believe his [or her] tenure has been terminated." *Pride Care Ambulance*, 356 NLRB 1023, 1024, quoting *Leiser Construction LLC*, 349 NLRB 413, 416 (2007), petition for review denied, enfd. 281 Fed. Appx. 781 (10th Cir. 2008); see also *Tri-State Wholesale Bldg. Supplies, Inc.,* 362 NLRB No. 85, at p. 5. In order to determine whether a prudent person would reasonably believe that their employment had been terminated, "it is necessary to consider the entire course of relevant events from the employee's perspective." *Pride Care Ambulance*, 356 NLRB supra at 1024, quoting *Leiser Construction LLC*, 349 NLRB at 416. In addition, the Board has held that any uncertainty created by the employer's statements or actions will be construed against it. *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 846 (2001). As the Board stated in Brunswick Hospital Center, if the employer's conduct engenders "a climate of ambiguity and confusion which reasonably caused strikers to believe that they had been discharged or, at the very least, that their employment status was questionable because of their strike activity, the burden of the results of that ambiguity must fall on the employer."[22] 265 NLRB 803, 810 (1982); see also *Kolkka Tables & Finnish-American Saunas*, 335 NLRB at 846–847; *Grosvenor Resort*, 336 NLRB 613, 617–618 (2001).

I find under the above standard that Zimmerman's December 22 email on behalf of Sparks to O'Leary constituted a discharge of the striking employees. In this email, Zimmerman informs the Union, "be advised that Sparks must reject the union's offer to return the striking employees to work at this time," without using the words "discharge" or "terminate." However, Zimmerman attributes Sparks' refusal to return the striking employees to work to "serious misconduct and unprotected activity by . . . the striking employees during the two separate strikes at Sparks between December 5 and December 19, including . . . violence, threats and intimidation towards patrons and employees, destruction of property and trespass." Zimmerman goes on to describe the refusal to return the striking employees to work

the union prior to hiring permanent replacements, but reversed the Board's conclusion that its having done so did not violate the Act.

[20] Sparks attempted to elicit testimony from LoIacono to the effect that on or about March 20, 2015, Abondolo told him that Zimmerman had stated that Sparks had permanently replaced the striking employees (Tr. 208–213, 357). As Zimmerman chose not to address this issue in his testimony, I credit LoIacono's statement that Abondolo never did so. In any event, affirmative testimony on LoIacono's part would have been nonprobative hearsay.

[21] Sparks attached a copy of this letter to its Post-Hearing Brief and raised this argument for the first time therein. General Counsel subsequently moved to strike based upon Sparks' failure to enter the evidence into the record during the hearing. Respondent countered that the ALJ may take judicial notice of records within the agency's own files. I have considered the letter submitted by Sparks, but do not ultimately find it material to my conclusions on the issue for the reasons which follow in the text.

[22] In its Posthearing Br., Sparks attempts to effectively reverse the well settled rule construing ambiguities in this respect against the employer by contending that the conduct of the Union and the 401(k) plan administrator "inflamed" the employees and caused any confusion regarding their employment status. RS Posthearing Brief at 21–23 and 24–25. I decline to do so.

as the "option" that "best protects the safety and security of its patrons, employees and delivery people from the [striking employees'] conduct," and raises the possibility of legal action by stating that Sparks "reserves all legal rights in connection with . . . Sparks' employees' conduct." I find that the striking employees could reasonably interpret Zimmerman's statements accusing them of "violence, threats," "intimidation," "destruction of property and trespass," declining to return them to work to ensure "the safety and security of [Sparks] patrons, employees and delivery people," and intimating potential legal action as discharging them from employment. Thus, in the context of the caselaw Zimmerman's statements in his December 22 email, in conjunction with Respondent's refusal to admit the employees onto Sparks' premises on December 19 after their unconditional offer to return to work, would lead the employees to reasonably believe that Sparks had terminated their employment.[23]

In reaching this conclusion, I reject Sparks' argument that Zimmerman's December 22 email should be the only piece of evidence considered in order to determine whether Respondent discharged the striking employees (RS Posthearing Br. at p. 18–20). Respondent contends that because the consolidated complaint alleges at ¶ 7(d) that Sparks, by Zimmerman's email, discharged the striking employees on December 22, no other evidence regarding the status of the striking employees, or their interactions with Sparks representatives, should be evaluated. However, Sparks, having heard the evidence presented by General Counsel, had a full and fair opportunity to adduce its own evidence relevant to the alleged discharge of the striking employees at the hearing. Sparks tacitly acknowledges as much; at the hearing and in its Posthearing Brief, Sparks stated, "neither [the December 22 email] nor any other action by Sparks could have led a reasonable person to believe Sparks had terminated any economic striker" (Tr. 352–354; Posthearing Br. at p. 18). In its Posthearing Brief Sparks goes on to address, in addition to Zimmerman's December 22 email, the parties' remarks at the January 20 bargaining session, and "confusion" which may have been caused by the striking employees' interactions with the benefits plan administrator (Posthearing Br. at 25). These arguments illustrate that, despite the wording of the complaint's allegation, Sparks had an opportunity to respond to additional evidence presented by the General Counsel which would tend to establish a reasonable belief on the part of the striking employees that they had been discharged.

Nor do I find persuasive the other evidence presented by Sparks in support of its contention that the striking employees could not have reasonably believed that they were discharged. Sparks argues that as of January 8, 2015, the striking employees' personal belongings remained in the employees' lockers at Sparks, indicating that they were still employed. However, this fact is irrelevant when the employees had been barred by Sparks from returning to the restaurant for any purpose in order to, according to Zimmerman, protect the current employees and Sparks' property.[24] Sparks' recall of one of the striking employees in August 2015 cannot possibly be relevant to the employees' reasonable belief as to their employment status during the seven intervening months. Furthermore, the fact that termination letters, which had been issued in the past, were not issued to the striking employees does not clarify the ambiguity in their employment status created by Sparks' conduct. There is no evidence that termination letters had been issued by Sparks as a long-standing practice,[25] and Edelstein admitted that sending such letters to discharged employees was a practice only recently implemented (Tr. 472). As discussed above, it is the perspective of the employees, and not the specific conduct of the employer, that is considered in determining whether they reasonably believed that they were discharged. Given Sparks' refusal to permit the striking employees to enter the premises on December 19 and Zimmerman's December 22 email, Sparks' declining to issue termination letters is insufficient to clarify the ambiguity created by its other conduct in the minds of the striking employees.

I am also unpersuaded by Sparks' contention that the language of the December 22 email is less explicit than the statements at issue in Tri-State Wholesale Building Supplies, Inc. and Grosvenor Resort which were found to engender a reasonable belief that economic strikers had been terminated. Tri-State Wholesale Building Supplies, Inc. involved an unequivocal statement that the economic strikers had been discharged. 362 NLRB No. 85 at p. 4 ("Please be advised you should not report for work at Tri-State Wholesale for any future shifts as your position has been filled and your employment terminated"). However, as discussed above, the standard requires not a definitive statement of discharge, but only circumstances engendering a reasonable belief on the part of the economic strikers that they have been terminated, with ambiguities created by the employer's conduct construed against them. The ambiguity created by Sparks' conduct here—the refusal to allow the striking employees on the premises on December 19 and Zimmerman's December 22 email—was sufficient to create a reasonable belief that the striking employees had been discharged. The situation at issue in Grosvenor Resort, also cited by Sparks, is

[23] I further note that some striking employees were provided with contradictory information regarding their employment status via Sparks' health insurance plan administrator which, at the very least, would raise the possibility that they had been discharged. The evidence establishes that in January 2015, some employees who participated in Sparks' group health insurance plan received letters stating that their coverage was being terminated based upon a qualifying event in the form of a "termination," and notifying them of their rights under COBRA (GC Exh. 8; Tr. 196). One month later, at least one employee was sent a second COBRA letter, describing the qualifying event in question as a "reduction in hours" (RS Exh. 2). The employee to whom the second COBRA letter was addressed testified that he never received it (Tr. 200–201). Nevertheless, I find it unreasonable to place on the employees the onus for discerning the meaning of different qualifying events under COBRA in order to dispel the confusion regarding their employment status which these letters doubtless engendered.

[24] Hajdini testified that at the time he did not know whether his belongings remained in his locker, because he had not been allowed back on Sparks' premises (Tr. 64).

[25] Sparks introduced two letters threatening employees who were apparently absent from work for two months with discharge if they did not return to work within a stated period of time, but both are dated September 24, 2014 (RS Exhs. 10, 11).

more analogous to the events established by the credible evidence here. In that case, the employer's communication to the striking workers stated "that they had been permanently replaced . . . that they should bring 'all their uniforms, hotel ID/timecard, and any other [of the Respondent's] property' to the Respondent's office," to receive "their 'final check' for their 'final wages,' including any outstanding vacation pay" contractually available only upon termination. Grosvenor Resort, 336 NLRB at 617–618. The Board concluded that the employer's references to a "final check" for "final wages" and "outstanding vacation pay" remittable solely upon discharge was sufficient to create a reasonable belief that the striking employees had been terminated. Here the references in Zimmerman's December 22 email to violence, threats, destruction of property, and other unlawful conduct, together with the implication of legal action, served a similar purpose.

The issue of the striking employees' understanding is further complicated here by the fact that Sparks did not inform the union or the strikers that it was hiring permanent replacement employees. Of course, Sparks was not required to do so. *Avery Heights*, 343 NLRB at 1305–1306. However, after December 19, 2014, Sparks continued to rebuff the striking employees' unconditional offers to return to work at the parties' January 8, 2015 negotiating session. The evidence also establishes that at subsequent negotiating sessions on January 20 and February 25, Sparks did not inform the union that it had prepared a preferential hiring list or an order for the recall of the striking employees. Sparks was within its rights when it did not disclose its intent to hire permanent replacement employees prior to doing so. However, this does not somehow remove from consideration the effect of its continued failure to provide this information to the striking employees and the union, together with the failure to provide a preferential hiring list, on the perception of the striking employees regarding their employment status.

In this regard, I find that Sparks' shifting explanations for its refusal to recall the striking employees particularly pertinent. As discussed above, Zimmerman's December 22 email provided one rationale for refusing to allow the striking employees to return to work—picket line misconduct, including "violence, threats," "intimidation," "destruction of property and trespass." The hiring of permanent replacements—which had allegedly occurred prior to that time—and a downturn in business which resulted in the need for a smaller staff were not mentioned. At the January 8, 2015 negotiating session Zimmerman reiterated this rationale, telling LoIacono that he could not return the striking employees to work because he was "protecting Sparks property." When the Union subsequently wrote to request information regarding Zimmerman's claim, Zimmerman responded with legal sophistry, and never provided information. Now, however, in its Posthearing Brief, Sparks does not even assert that some sort of picket line misconduct constituted its legitimate business justification for refusing to return the striking employees to work. Instead, Sparks contends that its legitimate business justifications consist of having hired permanent replacement employees prior to the striking employees' unconditional offer to return to work, and its economic downturn. These shifting contentions support the conclusion that Sparks' conduct with respect to the union and the striking employees created ambiguity regarding their status which should be construed against Respondent.

Finally, Sparks contends that the striking employees could not have interpreted the December 22 email as discharging them because the email was sent to Charging Party UFCW Local 342, and not to the employees. I find this argument unpersuasive as well. The record indicates that UFCW Local 342 was certified as the exclusive collective-bargaining representative of Sparks' waitstaff and bartenders on July 11, 2013, and the parties have been negotiating a collective-bargaining agreement since that time. Shop stewards and striking employees Kristofer Fuller and Valjon Hajdini attended collective-bargaining negotiations with Local 342 representatives. In this context, an assertion that email communications with Local 342 regarding the ongoing strike and contract negotiations were somehow insufficient to constitute notice to the striking employees is contrary to the legal status of the parties and simply defies common sense.

For all of the foregoing reasons, I find that Sparks discharged the striking employees on December 22, 2014, in contravention of their rights under Laidlaw and its progeny, in violation of Sections 8(a)(1) and (3) of the Act.

4. Kapovic's alleged unlawful statement soliciting employees to withdraw their support for the union

The complaint further alleges at Paragraph 5 that Sparks violated Section 8(a)(1) when Kapovic solicited employees to withdraw their support for the union on December 6, 2014. I find that during the meeting that Kapovic initiated with shop steward and negotiating committee member Valjon Hajdini, Kapovic solicited Hajdini and the employees to abandon their support for Local 342. I credit Hajdini's uncontradicted testimony that Kapovic asked to speak with him, and expressed his opinion that another strike of the waiters and bartenders would "drag the business down" and that the investors with whom he was considering buying the restaurant would "back off" as a result. I further credit Hajdini's testimony that Kapovic asked him whether the employees would "vote the Union out" if Kapovic and the other investors bought the restaurant.

It is well settled that employer attempts to convince employees to abandon their support for a union, or to convince other employees to abandon their union support or activities, violate Section 8(a)(1). See *Ozburn-Hessey Logistics LLC*, 357 NLRB No. 1526, 1553 (2011) (solicitation of employee to persuade another employee to abandon her support for the union violated Section 8(a)(1)). In addition, employer predictions of adverse business consequences as a result of union representation violate Section 8(a)(1) if they are not supported by an "objective factual basis." *Tradewest Incineration*, 336 NLRB 902, 907 (2001) (statement that union representation would make it "unlikely that our parent company will view [employer] as an appropriate location to invest in long-term capital" coercive); see also *General Electric Co.*, 321 NLRB 662, fn. 5, 666–667 (1996) (upholding ALJ finding of 8(a)(1) violation based on General Manager's remarks that "the company that supplies the investment dollars for our growth . . . [is] watching what happens here" and encouraging employees to vote against the union); Limestone Apparel Group, 255 NLRB 722, 730–731

(1981) (investor's statement that he would not commit any additional resources to the plant if the union came in violated Section 8(a)(1)).

I find that Kapovic's statements were unlawful given this legal context. Sparks admitted that Kapovic was at all material times a supervisor within the meaning of Section 2(11), and an agent within the meaning of Section 2(13) acting on Sparks' behalf. Kapovic approached Hajdini doubtless aware that Hajdini was a shop steward and a member of the union's negotiating committee, and by asking Hajdini whether the employees as a group would "vote the Union out" appears to have been addressing Hajdini in his representative capacity. Kapovic and Hajdini also discussed the strike in the context of the ongoing contract negotiations. When Hajdini stated to Kapovic that the employees "were not looking to go on strike again," only for "a simple contract," and that, "if you don't want us to go on strike . . . make an offer that is easy for us to accept," he was addressing Kapovic as a representative of Sparks. Kapovic responded in that capacity, stating that he would going to talk to Steve Cetta, "and see if we can do something about that." Accordingly, after Kapovic then asked Hajdini whether the employees could "vote the Union out" if Kapovic and his investors bought the restaurant, Hajdini again referred to the ongoing negotiations, stating, "All we want is a simple contract—that we get treated fairly."

Sparks contends in its Posthearing Brief that the evidence does not establish a violation, because Hajdini could not have reasonably believed that Kapovic was "reflecting company policy and speaking and acting for" Sparks' management, given Kapovic's comments regarding purchasing the business himself. Posthearing Brief at 46–47. However, Sparks admitted on the record that Kapovic was a supervisor within the meaning of Section 2(11) of the Act and an agent within the meaning of Section 2(13) (Tr. 7). As General Counsel points out, it is well settled that "an employer is bound by the acts and statements" of statutory supervisors, "whether specifically authorized or not." *Coastal Sunbelt Produce*, 362 NLRB No. 126 at p. 33 (2015); see also *Grouse Mountain Lodge*, 333 NLRB 1322, 1328 fn. 7 (2001); *Manhattan Hospital*, 280 NLRB 113, 118 (1986). There is also authority for the proposition that an employer is bound by the acts of supervisors that are contrary to the employer's directions. See *Rosedev Hospitality, Secaucus, LP*, 349 NLRB 202 fn. 3, 210–211 (2007); *Dixie Broadcasting Co*., 150 NLRB 1054, 1076–1079 (1965).

By contrast, the cases discussed by Sparks in its Brief involve situations where the individual in question was neither a statutory supervisor nor an agent of the employer, and the allegations that their statements violated Section 8(a)(1) were dismissed on that basis. See *Pan-Oston Co.,* 336 NLRB 305, 305–307 (2001) (employee who allegedly committed Section 8(a)(1) violations neither a statutory supervisor nor an agent of Respondent pursuant to Section 2(13)); *Waterbed World,* 286 NLRB 425, 426–427 (1987) (same). While, as discussed in *Pan-Oston Co*., an employee may function as an agent of the employer pursuant to Section 2(13) for one purpose but not another, Sparks provides no support for the position that that principle also applies to statutory supervisors within the meaning of Section 2(11). 336 NLRB at 305-306. The Board did apply this particular agency principle to a statutory supervisor in *Sea Mar Community Health Center*, 345 NLRB 947 (2005). However, that case involved a renegade supervisor who established an expanded dental lab and created a dental lab technician position, in direct contravention of specific orders by employer's CEO and Deputy Director prohibiting him from doing so. Sea *Mar Community Health Center*, 345 NLRB at 949–950. Characterizing the case as involving "unique circumstances," and an "unusual factual scenario," the Board held that the employer did not violate Section 8(a)(1) and (5) by refusing to provide the union with notice and the opportunity to bargain regarding the closure of the "rogue" dental lab and its effects.[26] *Sea Mar Community Health Center*, 345 NLRB at 947, 949–951. As a result, I do not find that case to be applicable here.

Instead, I find that the circumstances surrounding Kapovic's comments to Hajdini fall more appropriately within the scope of cases ruling that an employer is bound by the comments of a supervisor, even when unauthorized. Kapovic and Hajdini were on Sparks' premises and in a work area when Kapovic initiated the conversation. Although Kapovic referred to his interest in buying the restaurant and potential investors, Hajdini responded in terms of the current contract negotiations, stating that an offer from Sparks that the employees could accept would obviate the possibility of another strike. Kapovic in turn did not respond as an individual seeking to establish his own business; instead he said that he would speak to Cetta and "see if we can do something about that." Therefore, it was reasonable for Hajdini to believe that Kapovic was addressing him as a supervisor on behalf of Sparks, as well as a possible purchaser of the business. I therefore find that Sparks is bound by Kapovic's comments.

For all of the foregoing reasons, I find that Sparks violated Section 8(a)(1) when Kapovic unlawfully solicited of employees to abandon their support for the Union on December 6, 2014.

5. Remedial issues

Under current Board law, lawful economic strikers that have been unlawfully discharged are entitled to, "full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging, if necessary, any replacements, and mak[ing] them whole for any loss of earnings and other benefits." *Tri-State Whole-*

[26] I note that recently in *Postal Service*, 364 NLRB No. 62 (2016), the Board affirmed an ALJ's order finding that a statutory supervisor was acting in her personal interest, and not as an agent within the scope of her employment, when she obtained a stalking order against a union steward. The ALJ found, based on the supervisor's testimony, that the supervisor obtained the stalking order as "an act of desperation…to alleviate her own personal fears." *Postal Service*, 364 NLRB No. 62 at p. 18. As a result, the ALJ found that the only conduct of the supervisor imputable to the employer was the supervisor's enforcement of the terms of the protective order on the employer's premises, which interfered with the union steward's contract administration activities. *Postal Service*, 364 NLRB No. 62 at p. 1, 18–19. However, the Board noted that there were no exceptions filed with respect to this particular conclusion. *Postal Service*, 364 NLRB No. 62 at p. 1, fn. 2. As a result, I do not consider the case to have precedential import on the issue.

sale Building Supplies, 362 NLRB No. 85 at p. 1 (2015). However, remedies available to economic strikers are contingent upon whether the economic striker was permanently replaced before or after their unlawful discharge. *Detroit Newspapers*, 343 NLRB 1041–1042 (2004). If the strikers were permanently replaced after the unlawful discharge, they are "entitled to immediate reinstatement and backpay running from the date of the discharge (regardless of when, or if, [they] unconditionally offer[] to return to work)." *Detroit Newspapers*, 343 NLRB at 1041–1042, citing *Hormigonera del Toa, Inc*., 311 NLRB 956, 957–958, fn. 3 (1993). If the strikers were lawfully permanently replaced prior to the discharge, they are entitled to reinstatement upon the departure of the employee that permanently replaced them, with backpay running from the date that the replacement employee leaves. *Detroit Newspapers*, 343 NLRB at 1041–1042.

Here, the economic strike began on December 10, 2014. The striking employees made an unconditional offer to return to work on December 19, 2014, and were subsequently discharged on December 22, 2014, in violation of Sections 8(a)(1) and (3) of the Act. However, in this case the remedial distinction articulated in Detroit Newspapers is irrelevant given my conclusion that Respondent has not satisfied its burden to prove that it had permanently replaced the economic strikers prior to the unconditional offer to return to work on December 19, 2014. As a result, the economic strikers were not permanently replaced prior to their discharge on December 22, 2014. The striking employees are therefore entitled to immediate reinstatement and backpay running from December 19, 2014, the date of their unconditional offer to return to work.

General Counsel asks me to review and overturn the "Board's current remedial rule" as applied to unlawfully discharged economic strikers, so that the available remedies are no longer contingent upon whether the economic strikers were permanently replaced prior to the date of their discharge. As discussed above, such a venture is unnecessary. In any event, as an Administrative Law Judge, I am bound to follow existing Board law which has not been overruled by the Supreme Court. *Pathmark Stores, Inc.,* 342 NLRB 378 fn. 1 (2004); see also *Gas Spring Co*., 296 NLRB 84, 97–98 (1989), enfd. 908 F.2d 966 (4th Cir. 1990).

General Counsel also urges that I award search-for-work and work-related expenses to the economic strikers who were unlawfully discharged, regardless of the discharged strikers' interim earnings and separately from taxable net backpay, with interest. Such a component of the remedy is appropriate based upon the Board's recent ruling to that effect in *King Soopers, Inc.*, 364 NLRB No. 93 at p. 8–9 (2016) (providing for such a remedy, to be ordered on a retroactive basis). Backpay shall be calculated in accordance with *F.W. Woolworth Co*., 90 NLRB 289 (1950), being awarded on a quarterly basis with interest accruing as set forth in *New Horizons*, 283 NLRB 1173 (1987), and compounded in accordance with *Kentucky River Medical Center*, 356 NLRB 6 (2010). Interest on search-for-work and work-related expenses shall be calculated in the same manner. Respondent will also be required to absorb the adverse tax consequences, if any, of receiving a lump-sum backpay award covering periods longer than one year as set forth in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), and to file a report with the Social Security Administration allocating the payments to the appropriate calendar quarters.

CONCLUSIONS OF LAW

1. Respondent Michael Cetta, Inc. d/b/a Sparks Restaurant ("Respondent") is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. United Food and Commercial Workers ("the Union") is a Labor Organization within the meaning of Section 2(5) of the Act.
3. By failing and refusing to reinstate Gerardo Alarcon, Fredy Albarracin, Marko Beljan, James Campanella, Ian Collins, Elvis Cutra, Arlind Demaj, Kristofer Fuller, Adem Gjevukaj, Valjon Hajdini, Elvi Hoxhaj, Juan Iriarte, Ante Ivre, Amir Jakupi, Bardhyl Kelmendi, Jeton Kerahoda, Milazim Kukaj, Rachid Lamniji, Valon Lokaj, Silvio Lustica, Iber Mushkolaj, Gani Neziraj, Kenan Neziraj, Xhavit Neziraj, Adnan Nuredini, Juan Patino, Sadik Prelvukaj, Francisco Puente, Ermal Qelia, Nagip Resulbegu, Khalid Seddiki, Youssef Semlalo El Idrissi, Fatlum Spahija, Andrzej Stepien, Alim Tagani, and Mergim Zeqiraj since their unconditional offer to return to work on December 19, 2014, Respondent violated Sections 8(1) and (3) of the Act.
4. By denying the employees listed above their right to be placed on a preferential hiring list since December 19, 2014, Respondent violated Sections 8(a)(1) and (3) of the Act.
5. By discharging the employees listed above on or about December 22, 2014, Respondent violated Sections 8(a)(1) and (3) of the Act.
6. By soliciting employees to withdraw their support for the Union, Respondent violated Section 8(a)(1) of the Act.
7. The above violations are unfair labor practices affecting commerce within the meaning of Sections 2(6) and (7) of the Act.

REMEDY

Having found that Respondent engaged in an unfair labor practice, I shall order it to cease and desist from such conduct and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully refused to reinstate Gerardo Alarcon, Fredy Albarracin, Marko Beljan, James Campanella, Ian Collins, Elvis Cutra, Arlind Demaj, Kristofer Fuller, Adem Gjevukaj, Valjon Hajdini, Elvi Hoxhaj, Juan Iriarte, Ante Ivre, Amir Jakupi, Bardhyl Kelmendi, Jeton Kerahoda, Milazim Kukaj, Rachid Lamniji, Valon Lokaj, Silvio Lustica, Iber Mushkolaj, Gani Neziraj, Kenan Neziraj, Xhavit Neziraj, Adnan Nuredini, Juan Patino, Sadik Prelvukaj, Francisco Puente, Ermal Qelia, Nagip Resulbegu, Khalid Seddiki, Youssef Semlalo El Idrissi, Fatlum Spahija, Andrzej Stepien, Alim Tagani, and Mergim Zeqiraj, upon their unconditional offer to return to work, and that Respondent unlawfully discharged these employees, I shall order Respondent to offer them full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging, if necessary, any replace-

ments, and make them whole for any loss of earnings and other benefits. Backpay shall be calculated in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest accruing at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), and compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), Respondent shall also compensate the unlawfully discharged employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating backpay awards to the appropriate calendar quarters for each employee. Pursuant to *King Soopers, Inc.*, 364 NLRB No. 93 (2016), Respondent shall further compensate the employees named above for search-for-work and interim employment expenses, separately from taxable net backpay and regardless of whether they exceed the employees' interim earnings, with interest at the rate prescribed in *New Horizons*, compounded daily as prescribed in *Kentucky River Medical Center*, above.

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended[27]

ORDER

Respondent Michael Cetta, Inc. d/b/a Sparks Restaurant, New York, New York, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for engaging in an economic strike.

(b) Denying employees engaged in an economic strike their right to be placed on a preferential hiring list.

(c) Failing and refusing to reinstate employees engaged in an economic strike after their unconditional offer to return to work.

(d) Soliciting employees to withdraw their support for the Union.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Gerardo Alarcon, Fredy Albarracin, Marko Beljan, James Campanella, Ian Collins, Elvis Cutra, Arlind Demaj, Kristofer Fuller, Adem Gjevukaj, Valjon Hajdini, Elvi Hoxhaj, Juan Iriarte, Ante Ivre, Amir Jakupi, Bardhyl Kelmendi, Jeton Kerahoda, Milazim Kukaj, Rachid Lamniji, Valon Lokaj, Silvio Lustica, Iber Mushkolaj, Gani Neziraj, Kenan Neziraj, Xhavit Neziraj, Adnan Nuredini, Juan Patino, Sadik Prelvukaj, Francisco Puente, Ermal Qelia, Nagip Resulbegu, Khalid Seddiki, Youssef Semlalo El Idrissi, Fatlum Spahija, Andrzej Stepien, Alim Tagani, and Mergim Zeqiraj full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and discharging if necessary any replacements.

(b) Make the above employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this Decision.

(c) Compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post, at its facility in New York, New York, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees employed by the Respondent at any time since December 19, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 18, 2016

[27] If no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

[28] If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in an economic strike or other protected concerted activities.

WE WILL NOT deny you the right to be placed on a preferential hiring list when engaged in an economic strike.

WE WILL NOT unlawfully refuse to reinstate you if you are engaged in an economic strike and make an unconditional offer to return to work.

WE WILL NOT solicit you to withdraw your support for the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in your exercise of the rights listed above.

WE WILL within 14 days of the Board's Order, offer Gerardo Alarcon, Fredy Albarracin, Marko Beljan, James Campanella, Ian Collins, Elvis Cutra, Arlind Demaj, Kristofer Fuller, Adem Gjevukaj, Valjon Hajdini, Elvi Hoxhaj, Juan Iriarte, Ante Ivre, Amir Jakupi, Bardhyl Kelmendi, Jeton Kerahoda, Milazim Kukaj, Rachid Lamniji, Valon Lokaj, Silvio Lustica, Iber Mushkolaj, Gani Neziraj, Kenan Neziraj, Xhavit Neziraj, Adnan Nuredini, Juan Patino, Sadik Prelvukaj, Francisco Puente, Ermal Qelia, Nagip Resulbegu, Khalid Seddiki, Youssef Semlalo El Idrissi, Fatlum Spahija, Andrzej Stepien, Alim Tagani, and Mergim Zeqiraj full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and discharging if necessary any replacements.

WE WILL make those employees whole for any loss of earnings and other benefits resulting from our failure to reinstate them after their unconditional offer to return to work and from their discharge, less any net earnings, plus interest.

WE WILL compensate those employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of those employees, and WE WILL within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

MICHAEL CETTA, INC. D/B/A SPARKS RESTAURANT

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-142626 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 2
26 Federal Plz Ste 3614
New York, NY 10278-3699

Agency Website: www.nlrb.gov
Telephone: (212)264-0300
Fax: (212)264-2450

Download
NLRB
Mobile App

December 8, 2014

STEVEN CETTA, OWNER
Michael Cetta, Inc. d/b/a Sparks Restaurant
210 E 46th St
New York, NY 10017-2903

Re: Michael Cetta, Inc. d/b/a Sparks
Case 02-CA-142247

Dear MR. CETTA:

Enclosed is a copy of a charge that has been filed in this case. This letter tells you how to contact the Board agent who will be investigating the charge, explains your right to be represented, discusses presenting your evidence, and provides a brief explanation of our procedures, including how to submit documents to the NLRB.

Investigator: This charge is being investigated by Field Attorney REBECCA LEAF whose telephone number is (212)264-0493. If this Board agent is not available, you may contact Supervisory Attorney GEOFFREY DUNHAM whose telephone number is (212)264-0322.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlrb.gov, or from an NLRB office upon your request.

If you are contacted by someone about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board. Their knowledge regarding this proceeding was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Presentation of Your Evidence: We seek prompt resolutions of labor disputes. Therefore, I urge you or your representative to submit a complete written account of the facts and a statement of your position with respect to the allegations set forth in the charge as soon as possible. If the Board agent later asks for more evidence, I strongly urge you or your representative to cooperate fully by promptly presenting all evidence relevant to the investigation. In this way, the case can be fully investigated more quickly. **Due to the nature of the allegations in the enclosed unfair labor practice charge, we have identified this case as one in which injunctive relief pursuant to Section 10(j) of the Act may be appropriate.** Therefore, in addition to investigating the merits of the unfair labor practice allegations, the Board agent will also inquire into those factors relevant to making a determination as to whether

or not 10(j) injunctive relief is appropriate in this case. Accordingly, please include your position on the appropriateness of Section 10(j) relief when you submit your evidence relevant to the investigation.

Full and complete cooperation includes providing witnesses to give sworn affidavits to a Board agent, and providing all relevant documentary evidence requested by the Board agent. Sending us your written account of the facts and a statement of your position is not enough to be considered full and complete cooperation. A refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily.

In addition, either you or your representative must complete the enclosed Commerce Questionnaire to enable us to determine whether the NLRB has jurisdiction over this dispute. If you recently submitted this information in another case, or if you need assistance completing the form, please contact the Board agent.

We will not honor any request to place limitations on our use of position statements or evidence beyond those prescribed by the Freedom of Information Act and the Federal Records Act. Thus, we will not honor any claim of confidentiality except as provided by Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4), and any material you submit may be introduced as evidence at any hearing before an administrative law judge. We are also required by the Federal Records Act to keep copies of documents gathered in our investigation for some years after a case closes. Further, the Freedom of Information Act may require that we disclose such records in closed cases upon request, unless there is an applicable exemption. Examples of those exemptions are those that protect confidential financial information or personal privacy interests.

Procedures: We strongly urge everyone to submit all documents and other materials (except unfair labor practice charges and representation petitions) by E-Filing (not e-mailing) through our website, www.nlrb.gov. However, the Agency will continue to accept timely filed paper documents. Please include the case name and number indicated above on all your correspondence regarding the charge.

Information about the Agency, the procedures we follow in unfair labor practice cases and our customer service standards is available on our website, www.nlrb.gov or from an NLRB office upon your request. NLRB Form 4541 offers information that is helpful to parties involved in an investigation of an unfair labor practice charge.

We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

Karen P. Fernbach

KAREN P. FERNBACH
Regional Director

Enclosures:

1. Copy of Charge
2. Commerce Questionnaire

Revised 3/21/2011

NATIONAL LABOR RELATIONS BOARD

QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.

CASE NAME	CASE NUMBER
Michael Cetta, Inc. d/b/a Sparks	02-CA-142247

1. EXACT LEGAL TITLE OF ENTITY (As filed with State and/or stated in legal documents forming entity)

2. TYPE OF ENTITY

[ ] CORPORATION [ ] LLC [ ] LLP [ ] PARTNERSHIP [ ] SOLE PROPRIETORSHIP [ ] OTHER (Specify)

3. IF A CORPORATION or LLC

A. STATE OF INCORPORATION OR FORMATION	B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES

4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS

5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR

6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS *(Products handled or manufactured, or nature of services performed)*

7. A. PRINCIPAL LOCATION:	B. BRANCH LOCATIONS:

8. NUMBER OF PEOPLE PRESENTLY EMPLOYED

A. Total:	B. At the address involved in this matter:

9. DURING THE MOST RECENT *(Check appropriate box):* [ ] CALENDAR YR [ ] 12 MONTHS or [ ] FISCAL YR *(FY dates)*

	YES	NO
A. Did you **provide services** valued in excess of $50,000 directly to customers outside your State? If no, indicate actual value. $		
B. If you answered no to 9A, did you **provide services** valued in excess of $50,000 to customers in your State who purchased goods valued in excess of $50,000 from directly outside your State? If no, indicate the value of any such services you provided. $		
C. If you answered no to 9A and 9B, did you **provide services** valued in excess of $50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than $50,000, indicate amount. $		
D. Did you **sell goods** valued in excess of $50,000 directly to customers located outside your State? If less than $50,000, indicate amount. $		
E. If you answered no to 9D, did you **sell goods** valued in excess of $50,000 directly to customers located inside your State who purchased other goods valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $		
F. Did you **purchase and receive goods** valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $		
G. Did you **purchase and receive goods** valued in excess of $50,000 from enterprises who received the goods directly from points outside your State? If less than $50,000, indicate amount. $		
H. **Gross Revenues** from all sales or performance of services *(Check the largest amount)*: [ ] $100,000 [ ] $250,000 [ ] $500,000 [ ] $1,000,000 or more If less than $100,000, indicate amount.		
I. **Did you begin operations within the last 12 months?** If yes, specify date: _____		

10 ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?

[ ] YES [ ] NO *(If yes, name and address of association or group).*

11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS

NAME	TITLE	E-MAIL ADDRESS	TEL. NUMBER

12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE *(Type or Print)*	SIGNATURE	E-MAIL ADDRESS	DATE

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

FORM EXEMPT UNDER 44 U S C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case 02-CA-142247 Date Filed 12/4/14

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Michael Cetta, Inc. d/b/a Sparks

b. Tel. No. (212)687-4855

c. Cell No.

f. Fax No. (212)557-7409

d. Address *(Street, city, state, and ZIP code)*
210 East 46th Street
New York, NY 10017

e. Employer Representative
Steven Cetta

g. e-Mail

h. Number of workers employed
45

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
restaurant

j. Identify principal product or service
cooking and serving food

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*
As per attached

RECEIVED NLRB REGION 2 2014 DEC -4 AM 8:00 NEW YORK, NY

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
United Food and Commercial Workers Union Local 342

4a. Address *(Street and number, city, state, and ZIP code)*
166 East Jericho Turnpike
Mineola, NY 11501

4b. Tel. No. (516)747-5980

4c. Cell No.

4d. Fax No. (516)747-7961

4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By *(signature of representative or person making charge)* Martin L. Milner, Attorney *(Print/type name and title or office, if any)*

Tel. No. (516)561-6622

Office, if any, Cell No.

Fax No. (516)561-6828

e-Mail mmilner@simonandmilner.com

Address 99 W Hawthorne Ave Ste 308, Valley Stream, NY 11580

12/03/2014 *(date)*

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary, however, failure to supply the information will cause the NLRB to decline to invoke its processes.

That on or about July 19, 2013 the Charging Party was certified as the representative of all full time and regular part time waiters and bartenders employed by the Employer at its facility located at 210 East 46th Street, New York, New York.

That despite the continuing efforts of the Charging Party to negotiate a Collective Bargaining Agreement, due to the conduct of the Employer the parties have not entered into a Collective Bargaining Agreement to date.

That during a period including the prior six months, the Employer has engaged in bad faith bargaining, including but not limited to, its pronouncement that the terms and conditions of employment to be negotiated in a Collective Bargaining Agreement will be negotiated starting at "Zero" and "everyone loses everything". Said pronouncement is part and parcel of the Employer's conduct to negotiate without ever having the intent of reaching an agreement with the Union and to further undermine the position of the Union with the bargaining unit employees, all in violation of the Act.

FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case: 02-CA-142626 Date Filed: 12/10/14

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Michael Cetta, Inc.
d/b/a Sparks Restaurant

b. Tel. No. (212)687-4855

c. Cell No.

f. Fax No. (212)557-7409

d. Address (Street, city, state, and ZIP code)
210 East 46th Street
New York, NY 10017

e. Employer Representative
Steven Cetta

g. e-Mail

h. Number of workers employed
45

i. Type of Establishment (factory, mine, wholesaler, etc.)
restaurant

j. Identify principal product or service
cooking and serving food

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (3) and (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)
As per attached

RECEIVED
DEC 10 2014
NLRB REGION 2
NEW YORK, NY

3. Full name of party filing charge (if labor organization, give full name, including local name and number)
United Food and Commercial Workers Union Local 342

4a. Address (Street and number, city, state, and ZIP code)
166 East Jericho Turnpike
Mineola, NY 11501

4b. Tel. No. (516)747-5980

4c. Cell No.

4d. Fax No. (516)747-7961

4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)
United Food and Commercial Workers International Union

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By (signature of representative or person making charge) Martin L. Milner, Attorney (Print/type name and title or office, if any)

Address 99 W Hawthorne Ave Ste 308, Valley Stream, NY 11580

12/10/2014 (date)

Tel. No. (516)747-5980

Office, if any, Cell No.

Fax No. (516)747-7961

e-Mail mmilner@simonandmilner.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITL

GOVERNMENT EXHIBIT 4

PRIVACY ACT STATEMENT

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02-CA-142626 12/10/14

That on or about July 19, 2013, the Charging Party was certified as the representative of all full time and regular part time waiters and bartenders employed by the Employer at its facility located at 210 East 46th Street, New York, New York.

That despite the continuing efforts of the Charging Party to negotiate a Collective Bargaining Agreement, due to the conduct of the employer, the parties have not entered into a collective bargaining agreement to date.

That on or about December 5, 2014, the Employer by its representatives met with the Charging Party for purposes of negotiating a Collective Bargaining Agreement. At said meeting the Charging Party provided the Employer with a firm bargaining position and advised that a reply was needed. At that time the Employer representatives indicated that they were not the "principal bargainers" and were not in a position to provide any type of answer to the Union's offers. That by said acts, the employer is engaging in surface bargaining, bad faith bargaining and is otherwise in violation of the Act.

That on or about December 5, 2014, bargaining unit employees were locked in a banquet room of Employer's basement and not allowed to perform their job duties solely as a result of their support of the Charging Party.

That on or about December 5 and/or 6, 2014, the Employer by its agents advised the employees that in the event they engage in any strike action, that they would all be permanently replaced and their termination would be effectuated notwithstanding whether such a termination would be a violation of law. That said allegations and threats were made for purposes of intimidation and to otherwise undermine the support of said employees of the Charging Party.

That furthermore on or about December 5, 2014 to date, the Employer by its representatives have engaged in a pattern of surveillance of bargaining unit employees solely for the purposes of chilling the rights of employees to exercise their rights under the Act.

FORM EXEMPT UNDER 44 U.S.C. 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER
AMENDED

DO NOT WRITE IN THIS SPACE

Case: 02-CA-142626 Date Filed: 1/9/15

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a Name of Employer
Michael Cetta, Inc.
d/b/a Sparks Restaurant

b Tel. No. (212)687-4855

c. Cell No.

f. Fax No.

d Address (Street, city, state, and ZIP code)
210 East 46th Street
New York, NY 10017

e. Employer Representative
Steven Cetta

g. e-Mail

h. Number of workers employed
45

i Type of Establishment (factory, mine, wholesaler, etc.)
restaurant

j. Identify principal product or service
cooking and serving food

k The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (3) and (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act

2 Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)
As per attached

RECEIVED JAN 07 2015

3 Full name of party filing charge (if labor organization, give full name, including local name and number)
United Food and Commercial Workers Union Local 342

4a Address (Street and number, city, state, and ZIP code)
166 East Jericho Turnpike
Mineola, NY 11501

4b. Tel. No. (516)747-5980

4c. Cell No.

4d Fax No. (516)747-7961

4e. e-Mail

5 Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)
United Food and Commercial Workers International Union

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief

By (signature of representative or person making charge) Martin L. Milner, attorney (Print/type name and title or office, if any)

Address 99 W Hawthorne Ave Ste 308 Valley Stream NY 11580

01/08/2015 (date)

Tel. No. (516)561-6622

Office, if any, Cell No

Fax No. (516)561-6828

e-Mail mmilner@simonandmilner.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE,

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The princip... assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for... set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure... NLRB is voluntary, however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Government Exhibit C

That on or about July 19, 2013, the Charging Party was certified as the representative of all full time and regular part time waiters and bartenders employed by the Employer at its facility located at 210 East 46th Street, New York, New York.

That despite the continuing efforts of the Charging Party to negotiate a Collective Bargaining Agreement, due to the conduct of the employer, the parties have not entered into a collective bargaining agreement to date.

That on or about December 5, 2014, the Employer by its representatives met with the Charging Party for purposes of negotiating a Collective Bargaining Agreement. At said meeting the Charging Party provided the Employer with a firm bargaining position and advised that a reply was needed. At that time the Employer representatives indicated that they were not the "principal bargainers" and were not in a position to provide any type of answer to the Union's offers. That by said acts, the employer is engaging in surface bargaining, bad faith bargaining and is otherwise in violation of the Act.

That on or about December 5, 2014, bargaining unit employees were locked in a banquet room of Employer's basement and not allowed to perform their job duties solely as a result of their support of the Charging Party.

That on or about December 5 and/or 6, 2014, the Employer by its agents advised the employees that in the event they engage in any strike action, that they would all be permanently replaced and their termination would be effectuated notwithstanding whether such a termination would be a violation of law. That said allegations and threats were made for purposes of intimidation and to otherwise undermine the support of said employees of the Charging Party.

That furthermore on or about December 5, 2014 to date, the Employer by its representatives have engaged in a pattern of surveillance of bargaining unit employees solely for the purposes of chilling the rights of employees to exercise their rights under the Act.

That on or about December 6, 2014, the Employer, through its officers, agents, or representatives, made unlawful, coercive statements to employees about the Union.

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FORM EXEMPT UNDER 44 U.S.C. 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case: 02-CA-144852

Date Filed: 1/22/2015

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Michael Cetta, Inc.
d/b/a Sparks Restaurant

b. Tel. No. (212)687-4855

c. Cell No

f. Fax No (212)557-7409

d. Address (Street, city, state, and ZIP code)
210 East 46th Street
New York, NY 10017

e. Employer Representative
Steven Cetta

g. e-Mail

h. Number of workers employed
45

i. Type of Establishment (factory, mine, wholesaler, etc.)
restaurant

j. Identify principal product or service
cooking and serving food

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (3) and (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)
As per attached

RECEIVED
NLRB
REGION 2
2015 JAN 22 PM 2:23
NEW YORK, NY

3. Full name of party filing charge (if labor organization, give full name, including local name and number)
United Food and Commercial Workers Union Local 342

4a. Address (Street and number, city, state, and ZIP code)
166 East Jericho Turnpike
Mineola, NY 11501

4b. Tel. No. (516)747-5980

4c. Cell No

4d. Fax No. (516)747-7961

4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)
United Food and Commercial Workers International Union

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By _____ Martin L. Milner, attorney
(signature of representative or person making charge) (Print/type name and title or office, if any)

Tel. No (516)561-6622

Office, if any, Cell No

Fax No (516)561-6828

e-Mail mmilner@simonandmilner.com

Address 99 W Hawthorne Ave Ste 308, Valley Stream, NY 11580

01/22/2015
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, [illegible])

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principa[l] the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure voluntary, however, failure to supply the information will cause the NLRB to decline to invoke its processes.

GOVERNMENT EXHIBIT

That on or about December 19, 2014 in retaliation for concerted activity carried out by bargaining unit employees, the employer, to wit: Michael Cetta, Inc., illegally locked out all of those employees that were engaged in said activity.

That to date the employer has refused an unconditional offer to return to work and has continued to illegally lock out for discriminatory purposes all of those employees who engaged in concerted activity.

That on or about January 1, 2015, the employer, to wit: Michael Cetta, Inc., for retaliatory purposes, without notice to either the charging party, UFCW Local 342, or the employees of the employer, unilaterally changed terms and conditions of employment by terminating the health benefits of its employees who had been engaged in concerted activities as well as terminating employees access to their 401(k)/Pension benefit plan.

FORM EXEMPT UNDER 44 U S C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case	Date Filed
02-CA-145347	1/29/15

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a Name of Employer
Michael Cetta, Inc.
d/b/a Sparks Restaurant

b Tel No. (212)687-4855

c. Cell No.

f. Fax No (212)557-7409

d Address *(Street, city, state, and ZIP code)*
210 East 46th Street
New York, NY 10017

e. Employer Representative
Steven Cetta

g. e-Mail

h. Number of workers employed
45

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
restaurant

j Identify principal product or service
cooking and serving food

k The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*
As per attached

3 Full name of party filing charge *(if labor organization, give full name, including local name and number)*
United Food and Commercial Workers Union Local 342

4a. Address *(Street and number, city, state, and ZIP code)*
166 East Jericho Turnpike
Mineola, NY 11501

RECEIVED JAN 29 2015

4b. Tel. No. (516)747-5980

4c Cell No

4d Fax No (516)747-7961

4e. e-Mail

5 Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*
United Food and Commercial Workers International Union

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By *(signature of representative or person making charge)*

Martin L. Milner, attorney
(Print/type name and title or office, if any)

Tel. No (516)561-6622

Office, if any, Cell No.

Fax No. (516)561-6828

e-Mail mmilner@simonandmilner.com

Address 99 W Hawthorne Ave, Ste 308, Valley Stream, NY 11580

01/29/2015
(date)

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PRIVACY ACT STATEMENT

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That on or about January 9, 2015, the Charging Party, to wit: UFCW Local 342, did make a request to the Employer, to wit: Michael Cetta Inc. d/b/a Sparks Restaurant for certain information required to bargain in good faith with respect to an initial Collective Bargaining Agreement.

That on or about January 13, 2015, the Charging Party did make a second request to the Employer for the aforesaid information.

That notwithstanding the above, the Employer has failed to supply the aforesaid information requested by the Charging Party.

That by the above acts, the Employer is in violation of the Act.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

MICHAEL CETTA, INC. D/B/A SPARKS RESTAURANT

and

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 342

Case Nos. 02-CA-142626 and 02-CA-144852

ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT, AND NOTICE OF HEARING

Pursuant to Section 102.33 and 102.54(b) of the Rules and Regulations of the National Labor Relations Board (the Board), and to avoid unnecessary costs or delay, IT IS ORDERED THAT Cases 02-CA-142626 and 02-CA-144852, which are based on charges filed by the UNITED FOOD AND COMMERCIAL WORKERS LOCAL 342 (Union) against Michael Cetta, Inc. d/b/a Sparks Restaurant (Respondent) are consolidated.

This Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing, which is based on these charges, is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Board's Rules and Regulations and alleges that Respondent has violated the Act as described below.

1. (a) The charge in 02-CA-142626 was filed by the Charging Party on December 10, 2014, and a copy was served on Respondent by U.S. mail on December 11, 2014.

(b) The charge in 02-CA-142626 was amended on January 9, 2015, and a copy was served on Respondent by U.S. mail on January 12, 2015.

(c) The charge in 02-CA-144852 was filed by the Charging Party on January 22, 2015, and a copy was served on Respondent by U.S. mail on January 22, 2015.

2. (a) Respondent is a New York corporation with an office and place of business located at 210 East 46th Street, New York, New York.

(b) Respondent is engaged in the operation of a public restaurant selling food and beverages.

(c) Annually, in the course and conduct of its business operations, Respondent derives gross revenues from its retail operations in excess of $500,000.

(d) Annually, in the course and conduct of its business operations, Respondent purchases and receives at its facility goods and supplies valued in excess of $5,000 directly from points located outside the state of New York.

(e) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

4. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Valter Kapovic	Manager
Steven Cetta	Owner
Michael Cetta	Owner

5. On or about December 6, 2014, Respondent, by Valter Kapovic, in the Madison room, solicited employees to withdraw their support from the Union.

6. Since on or about December 10, 2014, the following 36 employees of Respondent, represented by the Union, ceased working concertedly and engaged in a strike.

1. Gerardo Alarcon
2. Fredy Albarracin
3. Marko Beljan
4. James Campanella
5. Ian Collins
6. Elvis Cutra
7. Arlind Demaj
8. Kristofer Fuller
9. Adem Gjevukaj
10. Valjon Hajdini
11. Elvi Hoxhaj
12. Juan Iriarte
13. Ante Ivre
14. Amir Jakupi
15. Bardhyl Kelmendi
16. Jeton Kerahoda
17. Milazim Kukaj
18. Rachid Lamniji
19. Valon Lokaj
20. Silvio Lustica
21. Iber Mushkolaj
22. Gani Neziraj
23. Kenan Neziraj
24. Xhavit Neziraj
25. Adnan Nuredini
26. Juan Patino
27. Sadik Prelvukaj
28. Francisco Puente
29. Ermal Qelia
30. Nagip Resulbegu
31. Khalid Seddiki
32. Youssef Semlalo El Idrissi
33. Fatlum Spahija
34. Andrzej Stepien
35. Alim Tagani
36. Mergim Zeqiraj

7. (a) On or about December 19, 2014, all the striking employees, described above in paragraph 6, by the Union, verbally and in writing, made an unconditional offer to return to their former or substantially equivalent positions of employment.

(b) Since on or about December 19, 2014, Respondent has failed and refused to reinstate any of the striking employees described above in paragraph 6 to their former or substantially equivalent positions of employment.

(c) Since on or about December 19, 2014, Respondent has denied the striking employees, described above in paragraph 6, their right to be placed on a preferential hiring list.

(d) On about December 22, 2014, Respondent by its counsel, by email to the Union, discharged the 36 striking employees described above in paragraph 6.

8. By the conduct described above in paragraph 5, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

9. By the conduct described above in paragraph 7, Respondent has been discriminating in regard to the hire, tenure, or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

10. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

The General Counsel seeks, as part of the remedy for the allegations in paragraph 7 that Respondent reimburse discriminatees for all search-for-work and work related expenses

regardless of whether the discriminatees received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall back pay period.

Finally, the General Counsel seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before June 12, 2015, or postmarked on or before June 11, 2015.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **E-File Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a

pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **July 14, 2015, at the 9:30 a.m. at Mary Taylor Walker Room at 26 Federal Plaza, Room 3614, New York, New York** and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: May 29, 2015

Karen P. Fernbach

Karen P. Fernbach
Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza Ste 3614
New York, NY 10278-3699

Attachments

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

----------X

MICHAEL CETTA, INC. D/B/A
SPARKS RESTAURANT

and

UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 342,

----------X

Case Nos.: 02-CA-142626; 144852

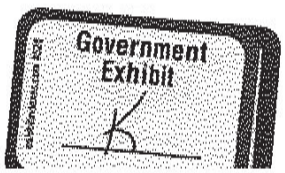
ANSWER OF RESPONDENT MICHAEL CETTA, INC. d/b/a SPARKS RESTAURANT

RESPONDENT MICHAEL CETTA, INC. D/B/A SPARKS RESTAURANT ("Sparks") by and through its attorneys, PHILLILPS NIZER LLP, as and for its Answer to the Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing ("Complaint") in the above-captioned action, states as follows:

1. Denies each and every allegation contained in the first two unnumbered paragraphs of the Complaint that Sparks has violated the National Labor Relations Act (the "Act") as alleged in the Complaint or in the charges filed by United Food and Commercial Workers Local 342 (the "Union") in Case Nos. 02-CA-142626 and/or 02-CA-144852 that purportedly form the basis of the Complaint.

2. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1(a) of the Complaint, except admits that Sparks received a copy of the charge in Case No. 02-CA-142626. Nonetheless, Sparks denies all substantive claims that it violated the Act as contained in the charge in Case No. 02-CA-142626 and that any entity or individual is entitled to any relief or damages under claim asserted therein.

3. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1(b) of the Complaint, except admits that



Sparks received a copy of the amended charge in Case No. 02-CA-142626. Nonetheless, Sparks denies all substantive claims that it violated the Act as contained in the charge in Case No. 02-CA-142626 and that any entity or individual is entitled to any relief or damages under claim asserted therein.

4. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1(c) of the Complaint, except admits that Sparks received a copy of the charge in Case No. 02-CA-144852. Nonetheless, Sparks denies all substantive claims that it violated the Act as contained in the charge in Case No. 02-CA-144852 and that any entity or individual is entitled to any relief or damages under claim asserted therein.

5. Admits the allegations contained in Paragraph 2(a) of the Complaint.

6. Admits the allegations contained in Paragraph 2(b) of the Complaint.

7. Admits the allegations contained in Paragraph 2(c) of the Complaint.

8. Admits the allegations contained in Paragraph 2(d) of the Complaint.

9. Admits the allegations contained in Paragraph 2(e) of the Complaint.

10. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 3 of the Complaint and refers all questions of law to the Board for resolution.

11. Denies the allegations contained in Paragraph 4 of the Complaint, except affirmatively states that Michael Cetta is the President of Sparks, Steven Cetta is the Vice President of Sparks and Valter Kapovic is a Maitre'd employed by Sparks, and refers all questions of law to the Board for resolution.

12. Denies the allegations contained in paragraph 5 of the Complaint.

13. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 6 of the Complaint and refers all questions of law to the Board for resolution, except admits that the 36 individuals listed in Paragraph 6 of the Complaint walked off their jobs and commenced an economic strike on December 10, 2014.

14. Denies the allegations contained in Paragraph 7(a) of the Complaint, except admits that on December 19, 2014, the Union's Secretary Treasurer sent an e-mail to Sparks' counsel stating, in part "[Local 342's] offer to return to work is unconditional…".

15. Denies the allegations contained in Paragraph 7(b) of the Complaint, except admits that none of the 36 individuals who walked off their job and commenced an economic strike on December 10, 2015 have been returned to their former or substantially equivalent positions of employment by Sparks.

16. Denies the allegations contained in Paragraph 7(c) of the Complaint.

17. Denies the allegations contained in Paragraph 7(d) of the Complaint.

18. Denies the allegations contained in Paragraph 8 of the Complaint.

19. Denies the allegations contained in Paragraph 9 of the Complaint.

20. Denies the allegations contained in Paragraph 10 of the Complaint.

21. Denies the allegations that Sparks violated the Act and that any entity or individual is entitled to any relief or damages asserted in the two paragraphs of the Complaint in the unnumbered section titled "REMEDY" and further demands judgment in its favor dismissing the Complaint, with prejudice and such other and further relief as the Board deems just and proper.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief can be granted against Sparks.

SECOND AFFIRMATIVE DEFENSE

All actions taken by Sparks in connection with the allegations contained in the Complaint and Charge Nos. 02-CA-142626 and 02-CA-144852 were based upon legitimate business reasons that did not violate the Act.

THIRD AFFIRMATIVE DEFENSE

All actions taken by Sparks in connection with the allegations contained in the Complaint and Charge Nos. 02-CA-142626 and 02-CA-144852 were based upon Sparks' good faith reliance on the Board's administrative decisions, case law and established precedent.

FOURTH AFFIRMATIVE DEFENSE

a. Sparks hired permanent replacements for the economic strikers prior to December 22, 2014, the date Sparks allegedly "discharged the 36 striking employees" as alleged in the Complaint.

b. Sparks did not have an independent unlawful motive or purpose for hiring permanent replacements for such economic strikers.

c. Sparks had a legitimate and substantial business justification for not returning such economic strikers to their former positions.

FIFTH AFFIRMATIVE DEFENSE

a. Sparks did not immediately notify the Union or the economic strikers that it hired permanent replacements for the economic strikers based upon legitimate business reasons including, without limitation, Sparks' fear of further violence, threats and intimidation towards

patrons and employees, destruction of property and trespass by the Union and the economic strikers.

b. Sparks did not have an independent unlawful motive or purpose for hiring permanent replacements for such economic strikers.

c. Sparks did not have an independent unlawful motive or purpose for not informing the Union or the economic strikers before hiring permanent replacements for such economic strikers.

d. Sparks did not have an independent unlawful motive or purpose for not informing the Union or the economic strikers that it hired permanent replacements for the economic strikers at the time it hired such permanent replacements.

e. Sparks subsequently informed the Union and the economic strikers that that it hired permanent replacements for the economic strikers.

f. The Region acknowledged existing Board precedent did not require Sparks to inform the Union or the economic strikers that it hired permanent replacements for the economic strikers at the time it hired such permanent replacements, and expressed its intent to seek to overturn same by this Complaint.

SIXTH AFFIRMATIVE DEFENSE

Sparks has the right to staff its business in a manner designed to maintain the efficient operation of its business.

SEVENTH AFFIRMATIVE DEFENSE

Sparks did not terminate the employment of any of the "36 striking employees" as alleged in the Complaint.

EIGHTH AFFIRMATIVE DEFENSE

No entity or person suffered any damages based upon any unlawful conduct alleged against Sparks in the Complaint.

NINTH AFFIRMATIVE DEFENSE

Any damages or losses to any entity or person suffered in connection with the allegations in the Complaint and Charge Nos. 02-CA-142626 and 02-CA-144852 were (in whole or in part) caused by, and resulted from, the conduct, acts and/or omissions of the Union and the individuals listed in Paragraph 6 of the Complaint and were not based upon any unlawful conduct alleged against Sparks in the Complaint and Charge Nos. 02-CA-142626 and 02-CA-144852.

TENTH AFFIRMATIVE DEFENSE

The Union and/or the individuals listed in Paragraph 6 of the Complaint failed to mitigate their damages, if any, based upon the conduct alleged against Sparks in the Complaint.

WHEREFORE, Sparks respectfully requests that the Complaint be dismissed in its entirety and such other and further relief as the Board deems just and proper.

Dated: New York, New York
June 12, 2015

PHILLIPS NIZER LLP

By: _____
Marc B. Zimmerman
Regina E. Faul
666 Fifth Avenue
New York, New York 10103-0084
(212) 977-9700
Attorneys for Sparks

To: Martin Milner, Esq. (via e-mail)
Lou Loloccono, Local 342, UFCW (via e-mail)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

MICHAEL CETTA, INC. D/B/A SPARKS RESTAURANT, Respondent

and **Case No. 02-CA-144852**

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 342, Charging Party **and**

02-CA-142626

ORDER AMENDING COMPLAINT AND AMENDMENT TO COMPLAINT

Pursuant to Section 102.17 of the Rules and Regulations of the National Labor Relations Board (the "Board"), the Complaint and Notice of Hearing issued on May 29, 2015 is amended as follows:

The following paragraph is inserted in the Remedy section, after the first paragraph:

As part of the remedy for the unfair labor practices alleged in paragraph 7 of the Complaint, the General Counsel seeks an order requiring that Respondent offer reinstatement to all 36 discharged strikers, and that Respondent make whole all 36 discharged strikers from the date of their discharge – December 22, 2014 – with interest, despite the fact that Respondent had hired permanent replacement workers before the date of discharge.

Signed at New York, New York
September 18, 2015

Karen P. Fernbach, Regional Director
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10278

NOTICE

The Complaint attached hereto alleges that the Respondent has violated certain sections of the National Labor Relations Act and a formal hearing has been schedule with respect thereto. By this notice I wish to call the attention of all parties to the policy of this Agency favoring a settlement of cases notwithstanding that a Complaint has issued. It is the position of the Agency that an early settlement will be an advantage to all parties because it eliminates, among other things, the time and expense involved in formal litigation of a matter. In furtherance of this policy the Board agent with whom you have dealt or the attorney to whom the matter has been assigned for trial, will contact the representatives of the Respondent and the Charging Party within a matter of days for the purpose of engaging in intensive discussions to determine whether or not a settlement can be achieved. All of the facilities of this office are available to the parties in furthering the achievement of a satisfactory disposition of the matter which will be consistent with the purpose and policies of the National Labor Relations Act.

Karen P. Fenbach

Regional Director
National Labor Relations Board
Region 2

United States Government
NATIONAL LABOR RELATIONS BOARD
Region 2
26 Federal Plaza – Room 3614
New York, New York 10278-0104

Telephone: **(212) 264-0313**
Facsimile: **(212) 264-2450**
Email: **Rebecca.Leaf@nlrb.gov**

September 25, 2015

Joel P. Biblowitz, Esq.
Associate Chief Administrative Law Judge
National Labor Relations Board
120 West 45th Street, 11th Floor
New York, New York 10036-5503

By FAX, 212-944-4904 **and e-filing to the Judge's Division**

Re: Michael Cetta d/b/a Sparks Restaurant
Case No. 02-CA-142626, 02-CA-144852

Dear Associate Chief Judge Biblowitz:

Counsel for the General Counsel opposes Michael Cetta d/b/a Sparks Restaurant's, herein Respondent, September 24 request for an adjournment of the above hearing scheduled for October 5, 2015.

By way of background, the Complaint issued on May 29, 2015, setting a hearing date of July 14, 2015.[1] On June 4, Respondent made its first postponement request in this case, and the General Counsel agreed to Respondent's request. Thereafter, an order rescheduling the hearing was issued on June 12, moving the hearing from July 14 to July 27. On or about July 10, it became clear that the case had to be sent to the Division of Advice, so the General Counsel asked Respondent to agree to a postponement[2] so that Advice had time to give Counsel for the General Counsel direction. Respondent agreed, and on July 14, an order issued rescheduling the hearing from July 27 to October 5.

To the extent Respondent argues that the General Counsel is not being lenient with this second postponement request, the General Counsel disagrees, as it already

[1] All dates herein are 2015, unless otherwise indicated.
[2] The General Counsel only proposed a postponement until September 16, but due to Respondent's scheduling conflicts in September, the hearing was set for October 5.

agreed to Respondent's first postponement request. Moreover, the General Counsel has not made any postponement requests as a tactical issue or on the eve of trial, but rather, only requested a postponement because its hands were tied due to the Advice requirement.

At the outset, the General Counsel notes that Respondent is requesting a postponement only one week before the hearing.

Second, the General Counsel opposes Respondent's request because Respondent has not presented a compelling reason for the request. In particular, Respondent stated that the reason for the request is that it believes its current counsel, Marc Zimmerman or Regina Faul, *might* be called as a witness, and that as a result, it has obtained special counsel in Thomas Bianco, of Meltzer Lippe.

As the Complaint was issued on May 29, Respondent's attorneys have been aware of the Complaint allegations for four months and have only decided to obtain outside counsel the week before the hearing. Certainly, nothing about the General Counsel's substantive allegations with respect to Respondent's liability, as outlined in the May 29 Complaint, has changed.

To be sure, Respondent is requesting a postponement based on a hypothetical situation that it has known about for four months. *Peter Vitalie Co.*, 310 NLRB 865, 865 (1993) (finding no prejudice in judge's denial of respondent's request for second continuance, where respondent had ample time to secure representation "with full knowledge of its responsibilities, elected to do nothing except seek 'another eleventh hour postponement'."). Ms. Faul and Mr. Zimmerman have not been terminated and continue to represent Respondent in these proceedings. Therefore, it is not as if Respondent has hired Mr. Bianco and is starting anew. The General Counsel contends that Mr. Bianco can prepare for the hearing over the next ten days if his sole role is to serve as outside counsel in the event Mr. Zimmerman or Ms. Faul is called to the stand.

Additionally, the Board has upheld ALJ decisions to deny postponements in situations where a respondent is represented by more than one counsel, or where another member of the firm can step in. *See Franks Flowers Express*, 219 NLRB 149 (1975), enfd. mem. 529 F.2d 520 (5th Cir. 1976) (holding judge correctly denied continuance where attorney, due to illness, was unable to proceed, but where the firm had five days to arrange for substitute counsel); *see also N.L.R.B. v. Glacier Packing Co.*, 507 F.2d 415, 416 (9th Cir. 1974) (properly denied request for continuance where another attorney from the law firm made a "special appearance" due to unavailability of first attorney). Here, Respondent is represented by both Regina Faul and Marc Zimmerman, of Phillips Nizer LLP. As a result, Sparks is not left without representation if counsel is called to testify. Of course, it is Respondent's prerogative to hire additional counsel, but its decision to do so should not delay the hearing.

Finally, the General Counsel opposes the request for scheduling reasons. I am the attorney of record and have been preparing for this case for months. I scheduled a

vacation around the October 5 hearing date, and am scheduled to be out of the country from October 17-27. If Respondent's request is granted, the hearing would begin while I am out of the country. Upon my return, I would need a couple weeks to begin preparing witnesses again, which would postpone this hearing until mid-November – four months after the original hearing date and 1.5 months after the scheduled date of October 5, not to mention close to the Thanksgiving holiday. Moreover, there are multiple witnesses, legal representatives, and others involved in this hearing who have made arrangements to be available for the hearing on October 5, and coordinating so many schedules is difficult and burdensome. Moreover, I am pregnant and due to go on maternity leave at the end of December, and postponement of this hearing would greatly prejudice the General Counsel, as it is likely new counsel would have to be assigned and/or a different attorney would have to write the post-hearing brief to the ALJ.

Finally, the discriminatees in this case – 36 employees – have been out of work for almost 10 months and are greatly prejudiced by unnecessary delays.

For all of the above reasons, the General Counsel opposes Respondent's request for a postponement. If Your Honor is inclined to grant Respondent's request, the General Counsel respectfully requests that the hearing be postponed only until October 13, 2015, which, on balance, allows Mr. Bianco more than two weeks to prepare, and would not as greatly prejudice all parties. The General Counsel requests that if such postponement to October 13 is granted, that Respondent be ordered to produce all documents in the General Counsel's subpoena *duces tecum* B-1-O96D9Z by the October 5 trial date to avoid further delay on the day the hearing opens.[3]

Very truly yours,

Rebecca A. Leaf

Rebecca A. Leaf
Field Attorney
26 Federal Plaza, Room 3614
New York, NY 10278
(212) 264-0313
Rebecca.Leaf@nlrb.gov

[3] On a September 24 conference call with the parties, Judge Esposito asked Respondent if it would be willing to produce documents in advance of the hearing in the event a postponement was granted, and Respondent, through Mr. Zimmerman, said he would comply with early production.

Cc: Thomas Bianco, Esq. at TBianco@meltzerlippe.com
Martin Milner, Esq. at mmilner@simonandmilner.com

FORM NLRB-31

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To The Custodian of Records, Michael Cetta, Inc. d/b/a Sparks Restaurant
210 East 46th Street New York, NY 10017

As requested by REBECCA LEAF, Counsel for the General Counsel

whose address is 26 Federal Plz Ste 3614, New York, NY 10278-3699
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE an Administrative Law Judge

of the National Labor Relations Board

at 26 Federal Plaza, Room 3614

in the City of New York, NY

on Monday, October 5, 2015 at 9:30 AM or any adjourned

or rescheduled date to testify in Michael Cetta, Inc. d/b/a Sparks Restaurant
02-CA-142626 and 02-CA-144852
(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

SEE ATTACHMENT

If you do not intend to comply with the subpoena, within 5 days (excluding intermediate Saturdays, Sundays, and holidays) after the date the subpoena is received, you must petition in writing to revoke the subpoena. Unless filed through the Board's E-Filing system, the petition to revoke must be received on or before the official closing time of the receiving office on the last day for filing. If filed through the Board's E-Filing system, it may be filed up to 11:59 pm in the local time zone of the receiving office on the last day for filing. Prior to a hearing, the petition to revoke should be filed with the Regional Director; during a hearing, it should be filed with the Hearing Officer or Administrative Law Judge conducting the hearing. See Board's Rules and Regulations, 29 C.F.R Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings) and 29 C.F.R Section 102.111(a)(1) and 102.111(b)(3) (time computation). Failure to follow these rules may result in the loss of any ability to raise objections to the subpoena in court.

B-1-O96D9Z

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at New York, NY

Dated: September 15, 2015

Chairman, National Labor Relations Board

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

Case 02-CA-142626

B-1-O96D9Z

RETURN OF SERVICE

I certify that, being a person over 18 years of age, I duly served a copy of this subpoena

(Check method used.)

- ☐ by person
- ☐ by certified mail
- ☐ by registered mail
- ☐ by telegraph
- ☐ by leaving copy at principal office or place of business at

_____

_____

_____

on the named person on

_____

(Month, day, and year)

_____

(Name of person making service)

_____

(Official title, if any)

CERTIFICATION OF SERVICE

I certify that named person was in attendance as a witness at

_____

on

(Month, day or days, and year)

_____

(Name of person certifying)

_____

(Official title)

Attachment to Subpoena *Duces Tecum*
Michael Cetta, Inc. d/b/a/ Sparks Restaurant
Case No. 02-CA-142626 and 02-CA-144852

DEFINITIONS

1. All references to "Respondent" refer to Michael Cetta, Inc. d/b/a Sparks Restaurant, and include its partners, officers, directors, employees, agents, and attorneys.

2. References to the "Union" refer to United Food & Commercial Workers Local 342, and include its officers, managers, directors, employees, agents, and attorneys.

3. References to "strikers" or "striking employees" refer to the following:

1. Gerardo Alarcon
2. Fredy Albarracin
3. Marko Beljan
4. James Campanella
5. Ian Collins
6. Elvis Cutra
7. Arlind Demaj
8. Kristofer Fuller
9. Adem Gjevukaj
10. Valjon Hajdini
11. Elvi Hoxhaj
12. Juan Iriarte
13. Ante Ivre
14. Amir Jakupi
15. Bardhyl Kelmendi
16. Jeton Kerahoda
17. Milazim Kukaj
18. Rachid Lamniji
19. Valon Lokaj
20. Silvio Lustica
21. Iber Mushkolaj
22. Gani Neziraj
23. Kenan Neziraj
24. Xhavit Neziraj
25. Adnan Nuredini
26. Juan Patino
27. Sadik Prelvukaj
28. Francisco Puente
29. Ermal Qelia
30. Nagip Resulbegu
31. Khalid Seddiki
32. Youssef Semlalo El Idrissi
33. Fatlum Spahija
34. Andrzej Stepien
35. Alim Tagani
36. Mergim Zeqiraj

4. The word "document" or "documents" are used in the broadest permissible sense, including but not limited to:

   a. All material in written or printed format of any kind, such as letters, correspondence, facsimiles, memoranda, records, telegrams, teletypes, cablegrams, reports, notes, books, papers, minutes, schedules, tabulations, computations, lists, ledgers, journals, purchase orders, contracts, invoices, agreements, vouchers, accounts, checks, affidavits, diaries, calendars, desk pads, drawings, sketches, charts, graphs, or any other written or printed matter or tangible thing on which any words, phrases or symbols are affixed;

   b. All electronic or digital information of any kind (translated, if necessary, into reasonably usable form) contained in any kind of electronic, or digital format, such as 1) electronic mail or "email"; 2) any information

maintained on any kind of computer disk, diskette, floppy disk, "zip" drive, "zip" file, or CD-ROM disk, tape drive, external hard drive, USB drive (also known as flash, thumb or key drives) or digital memory storage device; 3) any information maintained in an office or home personal computer or laptop computer; 4) any information maintained on any kind of server or mainframe system; 5) any word processing, spreadsheets, or similar documents; 6) voicemail stored electronically; 7) calendar programs; 8) information stored on smart phones (such as iPhones, Blackberrys) and/or similar devices; 9) digital pictures, video, and audio; 10) any other possible sources or active or inactive electronic or digital data or information;

c. All sound or picture recordings of any kind, such as tape recordings, photographs, videotapes, photostats, motion pictures, or slides; and

d. All copies or drafts or any such documents, including for electronic or digital information, any kind of data that has been archived, backed-up, resides on obsolete hardware, or is information that is residual or otherwise may have been deleted but is or may be present or residing in any way within computer systems or retrievable in any way.

5. A reference to any of the above-mentioned items, together with a general reference to "documents" includes, without limitation, all other "documents" as defined above.

6. "Containing" or "Showing" means setting forth, reflecting, referring to, relating to, referencing, connected with, concerning, about, regarding, involving, addressing, discussing, describing, mentioning, analyzing, or evaluating.

7. "Any," "each," and "all" shall be read to be all inclusive and to require to production of each and every document responsive to the request in which such terms appear.

8. "And" and "or" and any other conjunction or disjunction used herein shall be read both conjunctively and disjunctively, so as to make the request inclusive rather than exclusive, and to require the enumeration of all information responsive to all or any part of each request in which any conjunction or disjunction appears.

9. Whenever used herein, the singular shall be deemed to include the plural, and vice versa; the present tense shall be deemed to include past tense and vice versa; the masculine shall be deemed to include the feminine and vice versa.

10. The term "person" means any natural person, corporation, partnership, proprietorship, association, organization, trust, joint venture, or group of natural persons or other organizations.

11. The terms "copy" or "copies" shall refer to exact and complete copies of original documents.

INSTRUCTIONS

A. All documents produced pursuant to this subpoena should be organized and identified by the subpoena paragraph(s) to which each document or set of documents is responsive.

B. This request contemplates production of responsive documents in their entirety, without abbreviation or expurgation.

C. In complying with this subpoena, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agent, employee, or representative acting on your behalf. You are also required to produce documents that you have a legal right to obtain, that you have a right to copy, or to which you have access, as well as documents that you have place in the temporary possession, custody, or control of any third party.

D. If any document responsive to any request herein was, but no longer is in your possession, custody, or control, identify the document (stating its date, author, subject, recipients and intended recipients), explain the circumstances by which the document ceased to be in your possession, custody, or control, and identify all persons (stating the persons named, employer, title, business address and telephone number, and home address and telephone number) known or believed to have the document or a copy thereof in their possession, custody or control.

E. If any document responsive to any request herein was withheld from production on the asserted ground that it is privileged, please provide a privilege log identifying such document and providing the following information:

   a. the author;
   b. the recipient;
   c. the date of the original document;
   d. the subject matter of the document; and
   e. the grounds on which it is withheld.

F. Electronically stored information should be produced in the form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

G. Copies may be produced in lieu of originals, provided that such copies are exact and complete copies of original documents and that the original documents be made available at the time of production for the purposes of verifying the accuracy of such copies. Any copies or original documents which are different in any way from the original, whether by interlineations, receipt stamps, notations,

and indications of copies sent or received, or otherwise, shall themselves be considered original documents and must also be produced in addition to the originals or copies of originals.

H. This request is continuing in character and if additional responsive documents come to your attention following the date of the production, such documents must be promptly produced.

Attachment to Subpoena *Duces Tecum*
Michael Cetta, Inc. d/b/a/ Sparks Restaurant
Case No. 02-CA-142626 and 02-CA-144852

DOCUMENTS TO BE PRODUCED

1. Documents that will reflect correspondence between Respondent and the Union for the time period from December 1, 2014 to the present time.

2. Documents, including but not limited to weekly payroll records for all waiters and bartenders (including seasonal employees in these positions and/or employees who previously held other positions with Respondent who were converted to waiters or bartenders), which will indicate job title, hours worked, and rate of pay, for the time period from January 1, 2010 to the present time.

3. Documents, including but not limited to weekly schedules, resignation letters, and termination notices for waiters and bartenders (including seasonal employees in these positions and/or employees who previously held other positions with Respondent who were converted to waiters or bartenders), which will reflect the identity of all of Respondent's waiters and bartenders for the time period from October 1, 2014 to the present time.

4. Documents which will show Respondent's gross sales for the time period from January 1, 2010 to the present time.

5. Documents, including but not limited to weekly payroll documents, which will reflect all employees hired by Respondent and their job title, hours worked, and rate of pay, and any turnover, for the time period from October 1, 2014 to the present time.

6. Documents, including but not limited to all permanent offer letters issued by Respondent to replacement waiters and/or bartenders, for the time period from December 1, 2014 to the present time.

7. Documents which will reflect the job description and/or job responsibilities for the individual Respondent hired on or about December 12, 2014 as a manager to exclusively manage private parties.

8. Documents, including but not limited to employment applications, other employment documents, weekly work schedule, and weekly payroll records for the individual referenced in Paragraph 7.

9. Documents, including but not limited to the weekly work schedule and weekly payroll records, which will reflect all individuals employed by Respondent in the position referenced above in Paragraph 7 and the weekly hours worked in such position, for the time period from January 1, 2010 to the present time.

10. Documents, including but not limited to job postings, emails, conversations that have been memorialized in writing, and minutes of meetings, which will reflect

Respondent's decision-making process in hiring the individual referenced in Paragraph 7.

11. For the time period from January 1, 2014 to the present time, documents maintained by Respondent, which will show the job descriptions, job responsibilities, job titles, job duties, and involvement of Valter Kapovic, Steven Cetta, and Michael Cetta, with Respondent's business operations, including, but not limited to:
    a.) Written warnings or other disciplinary actions that were either written by, initialed by and/or issued to employees by the above-named individuals;
    b.) Recommendations by the above-named individuals regarding discipline of employees;
    c.) Time off requests made by employees that have been approved, reviewed, signed or initialed by the above-named individuals;
    d.) All correspondence regarding the hiring and firing of employees employed by Respondent by the above-named individuals;
    e.) Work assignments and/or work schedules created by the above-named individuals;
    f.) Directions and/or instructions to staff members created by the above-named individuals;
    g.) Bargaining proposals reviewed, approved, drafted, signed, and/or edited by the above-named individuals;
    h.) Documents issued to any staff on the letterhead, "From the desk of Steve Cetta" or "From the desk of Michael Cetta";
    i.) New York State Department of Labor Unemployment Insurance documents reviewed, completed, filled out, and/or signed by the above-named individuals;
    j.) Receipts of deliveries, orders, or other documents generated in the course of operating the business containing the signatures of those named in Paragraph 11.[1]

12. Documents, including but not limited to photographic/video evidence and police reports, which will show evidence of vandalism or other misconduct on or near Respondent's premises for the time period from December 10 to 19, 2014.

13. Documents, including but not limited to photographic/video evidence and police reports, which will show that any striking employees engaged in the conduct described above in Paragraph 12.

---

[1] In lieu of the records required in this paragraph, compliance with this subpoena may be accomplished by reaching a stipulation, or by amending Respondent's Answer to admit that at material times the individuals named in this paragraph were supervisors within the meaning of Section 2(11) of the Act and agents of Respondent acting on its behalf within the meaning of Section 2(13) of the Act.

Attachment to Subpoena *Duces Tecum*
Michael Cetta, Inc. d/b/a/ Sparks Restaurant
Case No. 02-CA-142626 and 02-CA-144852

14. The current or most recent Michael Cetta Inc. Employee Handbook and/or other document setting forth Respondent's policies for employees.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

MICHAEL CETTA, INC. D/B/A SPARKS RESTAURANT

and **Case No. 02-CA-144852**

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 342 **and**

02-CA-142626

GENERAL COUNSEL OPPOSITION TO RESPONDENT'S PETITION TO REVOKE SUBPOENA *DUCES TECUM* B-1-O96D9Z

Counsel for the General Counsel hereby opposes the Petition to Revoke Subpoena *Duces Tecum* B-1-O96D9Z (the "Petition") submitted by Michael Cetta d/b/a Sparks Restaurant ("Respondent") on September 25, 2015. Respondent's Petition (attached hereto, without accompanying Exhibits[1], as Exhibit A) seeks to revoke portions of Subpoena No. B1-O96D9Z served upon Respondent by the General Counsel on September 15, 2015. A copy of the Subpoena *duces tecum* (the "Subpoena") is attached hereto as Exhibit B. The Complaint and Notice of Hearing (the "Complaint") and Respondent's Answer (the "Answer"), are attached hereto as Exhibits C and D, respectively.

The General Counsel respectfully contends that all of the items requested in the Subpoena are relevant to the trial of the instant case and requests that Respondent be ordered to comply fully with the Subpoena.

[1] Respondent's sole exhibit attached to its Petition was the Subpoena, which is annexed hereto as Exhibit B.

PROCEDURAL BACKGROUND

Through Counsel, UFCW Local 342 ("Union") filed the underlying charges against Respondent beginning on December 10, 2014. The Regional Director issued the Complaint in Case No. 02-CA-142626 and 02-CA-144852 on May 29, 2015 (Exhibit C). Respondent filed its Answer to the Complaint on June 12, 2015 (Exhibit D).

The Complaint alleges that on December 10, 2014, 36 waiters and bartenders employed by Respondent concertedly ceased working and engaged in a strike. The Complaint further alleges that on December 19, 2014, the striking employees all verbally and in writing made an unconditional offer to return to their former or substantially equivalent positions of employment. Since December 19, 2014, Respondent has failed and refused to reinstate any of the striking employees and has denied employees the right to be placed on a preferential hiring list.[2] The Complaint additionally alleges that on December 22, 2014, Respondent discharged the 36 striking employees. Finally, the Complaint alleges that on December 6, 2014, Respondent, through Manager Valter Kapovic, solicited employees to withdraw their support from the Union.

The General Counsel served the Subpoena on September 15, 2015. Though Respondent, in its Petition, says that it did not receive the Subpoena until September 21, 2015, the General Counsel served Respondent's attorneys with a copy of the Subpoena via email on September 15, 2015 (Exhibit E) and Respondent's custodian of records returned a certified mail card with a date of September 19, 2015 (Exhibit F). Though the Petition is therefore, timely filed, the General Counsel must clarify the dates for the record.

---

[2] In its Petition, Respondent states that the Union claimed that Respondent's decision to replace the striking employees was based on antiunion animus, and that as a result, the Region issued a Complaint. To be clear, Respondent's motivation for hiring replacement employees is not at issue in this case, as the Complaint does not allege independent unlawful motive for the hiring of the replacements.

ARGUMENT

The applicable test for determining whether an administrative subpoena is appropriate is: (1) whether the inquiry is within the authority of the issuing agency; (2) whether the request is too indefinite; and (3) whether the information sought is reasonably relevant. *United States v. Morton Salt Company*, 338 U.S. 632 (1950); *United States v. Powell*, 379 U.S. 48, 57-78 (1964); *NLRB v. Carolina Food Processors, Inc.*, 81 F.2d 507, 510 (4th Cir. 1996); *In re McVane*, 44 F.2d 1127 (2d Cir. 1995); *Equal Employment Opportunity Commission v. Maryland Cup Corporation*, 785 F.2d 471 (4th Cir. 1986)[3]

The applicable test for determining the merits of a petition to revoke a government subpoena is whether or not the evidence desired by the subpoena is "plainly incompetent or irrelevant." *Endicott Johnson Corporation*, 317 U.S. 501, 509 (1943). A government subpoena is proper, and a petition to revoke should be denied, so long as the evidence sought by the subpoena "relates to or touches the matter under investigation" in the case. *Cudahy Packing Co. v. NLRB*, 117 F.2d 692, 694 (10th Cir. 1941).

A. The General Counsel is entitled to seek documents in a trial subpoena that might already have been produced during an investigation.

Respondent has argued in paragraph (c) of the Petition that the General Counsel is seeking documents in its Subpoena that Respondent already produced during the investigation. However, the General Counsel is entitled to seek these documents under the trial subpoena. *See 2927 Eighth Avenue Food Corp.*, 1999 WL 33454788 (Div. of Judges 1999) (concluding

[3] The courts' analyses in cases involving the enforcement of administrative subpoenas issued by the EEOC are relevant and applicable to the enforcement of subpoenas issued by the NLRB because the EEOC is authorized to issue subpoenas by Section 710 of Title VII, 42 U.S.C. Section 2000e-9, which incorporates by reference Section 11 of the National Labor Relations Act. Thus, the statutory authority by which the NLRB and the EEOC issue subpoenas and by which those subpoenas are enforced is identical for all practical purposes.

Respondent had a duty to produce documents in question at trial, even though they had already produced such documents during the investigation and that Respondent's arguments otherwise were "legally incorrect"). The General Counsel concedes that Respondent produced some documents during the investigation, but that nearly all of these documents were redacted without explanation. The General Counsel seeks unredacted versions of these documents for the hearing.

Based on the foregoing, Respondent should be required to produce relevant documents pursuant to the instant trial Subpoena regardless of whether Respondent might have produced documents previously during the Region's investigation.

B. <u>The documents requested are not unduly burdensome.</u>

Respondent argues in paragraph (d), (e), (f), (g), (h), (i)[4], and (j) that it would be unduly burdensome for Respondent to produce various documents. It is well established that a party seeking to quash or modify a subpoena *duces tecum* has the burden of establishing that the subpoena is unreasonable, burdensome, or would cause undue hardship and expense. *See FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977), *cert. denied* 431 U.S. 974 (1977). A respondent must show that compliance with the subpoena "would seriously disrupt normal business operations." *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986), *cert. denied* 479 U.S. 815 (1986); s*ee also EEOC v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1040 (10th Cir. 1993); *FTC v. Texaco, Inc.*, 555 F.2d at 882 (holding that burdensome alone is not enough, and that petitioner must show subpoena will "unduly disrupt or seriously hinder normal operations of a business."). Parties cannot refuse to comply with subpoenas for relevant

[4] To the extent Respondent argues that compliance with this paragraph of the Subpoena would require production of customer receipts, the General Counsel contends Respondent can comply with Paragraph 4 (documents reflecting gross sales) of the Subpoena without production of customer receipts. The General Counsel's request is not designed to be unreasonable in this respect. Since Respondent has already produced gross sales records (in redacted form) during the investigation, the General Counsel knows Respondent can easily produce these records in unredacted form for the hearing.

information merely because compliance may require the production of a large number of documents. *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 513-14 (4th Cir. 1996); *NLRB v. GHR Energy Corp.*, 707 F.2d 110, 113-14 (5th Cir. 1982); *see also NLRB v. Line*, 50 F.3d 311, 314-15 (5th Cir. 1995) (subpoena seeking five years of business records held not to be overbroad). On the contrary, it may be presumed that an entity that maintains a large volume of records is sufficiently equipped to locate and produce them. *Carolina Food Processors, Inc.*, 81 F.3d at 513-14 (citing *NLRB v. United Aircraft Corp.*, 200 F.Supp. 48, 51-52 (D. Conn. 1961), *aff'd* 300 F.2d 442 (2d Cir. 1962)).

Respondent mostly argues that producing documents dating back to January 1, 2010 would be unduly burdensome, but does not explain how it would disrupt its normal business operations to do so, as required by the case law. What is more, as Respondent noted, it already gathered, reviewed, and produced most of these documents dating back to January 1, 2010 during the investigation.[5] As such, it can hardly argue that it would be unduly burdensome to produce the documents again for the hearing.

The General Counsel would be satisfied that Respondent has complied with Subpoena Paragraphs 2, 3, 5, 8, and 9 if it produces the following unredacted documents, some of which Respondent has already produced in redacted form during the investigation[6]:

1. Employee hours summary (weekly)
2. Weekly payroll records
3. Lunch & Dinner Tips (weekly), which is a grid listing typed employee names, day of the week, and tips earned each day
4. Daily Tip Sheet, which shows lunch and dinner columns next to one another, with employee typed names in both, and handwriting to either check off who worked that day, or to cross off who did not work. There is a shaded area on this page that says, "Please do not write anything in the shaded area."

---

[5] Again, the documents produced during the investigation were redacted without explanation and the General Counsel seeks unredacted versions of the same.

[6] The documents are not privileged and Respondent has provided no explanation for the redactions.

5. Untitled document, which upon information and belief is the dinner schedule, which lists employee names (typed), days of the week, and handwritten notes with who works at what time (i.e. "C" for closing or a dot for another shift, "X" when not scheduled), along with the closing managers at the bottom, "Money Matters" at the bottom.
6. Daily schedules (usually written by Manager and Maitre D' Musa Hoxha), on which he writes the names of employees and the section of the restaurant they will work in that particular shift.

The General Counsel is aware that Respondent maintains more documents than those listed above, but would be satisfied if Respondent produces the above, barring any unforeseen issues at the hearing, in which case the General Counsel reserves the right to request additional documents under these paragraphs of the Subpoena.

The General Counsel notes that it has not received any documents from March 1, 2015 to the present time and that these documents are directly related to the Complaint allegation, which alleges that Respondent has failed and refused to reinstate strikers to open positions to date. Moreover, the General Counsel does not have all of the above documents for a number of months in 2014 and 2015.

Based on the foregoing, Respondent has failed to meet its burden of proving the unduly burdensome nature of the Subpoena, and its argument that the Subpoena is unduly burdensome must be dismissed. Moreover, the documents requested are relevant to the Complaint and Respondent's asserted defenses, as will be discussed more fully below.

C. The documents requested are not overly broad.

Respondent argues in paragraphs (d), (e), (f), (g), and (h) of its Petition that the General Counsel's Subpoena is overly broad and/or seeks information not relevant to any matter under investigation or in question in the proceeding. Respondent's Petition cites the following

paragraphs in the Subpoena as overly broad and/or not relevant to the Complaint: 2, 3, 4, 5, 7, 8, 9, 11, and 14, "among others."[7] I will address each numbered paragraph below.

1. The request in Paragraphs 2 and 3

In Paragraph 2, the General Counsel seeks records that will indicate job title, hours worked and rate of pay for waiters and bartenders for the time period from January 1, 2010 to the present time. Similarly, Paragraph 3 seeks documents which will reflect the identity of Respondent's waiters and bartenders for the time period from October 1, 2014[8] to the present time.

Under well-settled law, economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements remain employees and are entitled to full reinstatement upon departure of the replacements unless they have in the meantime acquired regular and substantially equivalent employment or the employer can sustain its burden of proof that its failure to offer full reinstatement was for legitimate and substantial business reasons. *Laidlaw Corp.*, 171 NLRB 1366 (1968); *see also N. L. R. B. v. Fleetwood Trailer Co.*, 389 U.S. 375, 380-81 (1967). Once Respondent presents its case, the burden shifts back to the General Counsel to show Respondent's asserted defenses were unlawful. *Reid J. Cavanaugh*, 255 NLRB 194, 200 (1981). Here, the Complaint alleges that Respondent failed and refused to return strikers to work after their unconditional offer to return to work, despite the availability of positions and the continued departure of replacement employees in the weeks and months following the offer to return to work. Thus, the General Counsel seeks payroll

[7] It is difficult for the General Counsel to address its request for documents under paragraphs in the Subpoena that Respondent does not specifically identify.

[8] Respondent has also argued Paragraph 3 is unduly burdensome, but the General Counsel notes the limited date range.

documents to show the full complement of waiters and bartenders before and after the strike, which relates to the shifting burdens of proof in this case.

Moreover, the General Counsel seeks these documents to respond to Respondent's asserted defense, in which it claims it had a full complement of employees and had no need to hire more. As a result of this defense, the General Counsel seeks five years of documents to establish Respondent's pattern or practice with regard to its staffing numbers of waiters and bartenders. Additionally, the document request extends through the present time, since Respondent has a duty to reinstate the strikers as positions become available, and it is impossible to tell whether and when any vacancies have occurred without these records.

2. The request in Paragraph 4

Paragraph 4 of the Subpoena seeks documents to show Respondent's gross sales for the time period from January 1, 2010 to the present time. Respondent argues in paragraph (i) that the General Counsel has provided no explanation for its request in Paragraph 4 of the Subpoena[9] for gross sales records from January 1, 2010 to the present time. However, the General Counsel's request in this Paragraph is directly related to Respondent's asserted economic defense during the investigation that revenue was down and that there was a downturn in business, and that it, therefore, had no need to reinstate strikers after they unconditionally offered to return to work.[10] Moreover, these records relate to the records sought in Paragraphs 2 and 3 of the Subpoena, in that Respondent has tied its sales numbers to its work force numbers.

---

[9] Respondent mistakenly refers to the request for gross sales records in its Petition as Paragraph 5 of the Subpoena. This information is sought under Paragraph 4 of the Subpoena. Moreover, the General Counsel has no duty to explain in its Subpoena the reasons for the request for documents.

[10] Though Respondent has asserted downturn in bookings and revenue, the most accurate picture of Respondent's business during this time period is sales, as any number of factors can affect revenue (i.e., increase cost of goods, increased overhead, etc.). Thus, the General Counsel has properly requested sales numbers in its Subpoena, which will provide the most accurate picture of Respondent's business at the time of the asserted economic defense.

To the extent that Respondent argues that this request is unduly burdensome, as stated above, it has already produced some of these documents in redacted form during the investigation, and it should not prove difficult to provide the information – unredacted – again.[11]

3. The request in Paragraph 5

In Paragraph 5 of the Subpoena, the General Counsel seeks documents that will reflect all employees hired by Respondent, including their job title, hours worked, rate of pay, and turnover, for the time period from October 1, 2014 to the present time. As stated above in Section C1, the information sought under this paragraph is directly relevant to the Complaint allegation that Respondent failed and refused to reinstate strikers to open positions upon their unconditional offer to return to work. Moreover, the requested information relates directly to Respondent's asserted economic defense for not needing to reinstate any strikers. To the extent that Respondent has asserted that business in the restaurant as a whole was slow, Respondent would not need to hire any new employees at all. Moreover, to the extent there was turnover in other departments, as there was with waiters and bartenders, Respondent also would have had no need to replace employees in those positions, per its asserted defense. The documents requested under Paragraph 5, therefore, relate directly to allegations in the Complaint and Respondent's asserted defense.

Furthermore, though Respondent argues that this request is unduly burdensome, the time period is narrowly tailored to October 1, 2014 to the present time, covering only about a year of records.

4. The request in Paragraphs 7, 8, and 9

[11] The request is not for jurisdictional reasons, as Respondent estimated in its Petition. Respondent already admitted jurisdiction in its Answer.

Respondent argues in paragraph (e) and (g) that Paragraphs 7, 8, and 9 of the Subpoena are overbroad and/or unduly burdensome to produce. Paragraph 7 and 8 of the Subpoena seek documents related to Respondent's decision to hire the banquet manager at the time of the strike, and the banquet manager's job duties and hours of work. Similarly, Paragraph 9 of the Subpoena seeks the weekly work schedule and weekly payroll records for any individuals performing the job of banquet manager for the time period from January 1, 2010 to the present time.

During the investigation, Respondent asserted without explanation that it did not reinstate strikers because it had hired a banquet manager and that this obviated the need for waiters and bartenders. As such, the request in these paragraphs relate directly to the Complaint allegation that Respondent failed and refused to reinstate strikers to existing positions, and Respondent's asserted defense that it had a legitimate and substantial business justification for refusing to reinstate the employees. *See Laidlaw*, 171 NLRB 1366 (1988).

To the extent Respondent argues that this request is burdensome, Paragraphs 7 and 8 seek documents related to one individual who was hired as a banquet manager in December of 2014, and therefore, it should not be burdensome for Respondent to comply.

5. Paragraph 11 and Respondent's Stipulation

In its Petition, Respondent stipulates that at material times, Michael Cetta and Steven Cetta were and are supervisors within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act. As such, the General Counsel withdraws its request for documents under Paragraph 11 of the Subpoena as it relates to Michael Cetta and Steven Cetta.

However, Respondent has not stipulated to the supervisory and/or agency status of Valter Kapovic. Since it has not done so, the General Counsel requests all items under Subpoena

Paragraph 11 as it relates to Kapovic. The documents are directly related to Kapovic's supervisory status, and therefore, are directly related to Paragraphs 4 and 5 of the Complaint, which allege Kapovic as a supervisor and agent, and which allege that Respondent, through Kapovic, solicited employees to withdraw their support from the Union.

The General Counsel has attempted to accommodate Respondent in this request by offering a stipulation/amendment of its Answer in lieu of production. The General Counsel continues to offer this option as it relates to Kapovic. However, if Respondent does not agree, the General Counsel is entitled to these documents, which relate directly to the Complaint allegations. The General Counsel continues to be puzzled by Respondent's failure to admit Kapovic's status, as it admits in its Petition that it presented "management personnel" to the Board for affidavits (the only individual it produced during the investigation was Kapovic) and since Respondent's attorney, Regina Faul, insisted on being present during Kapovic's affidavit due to his status as a supervisor and agent of Respondent, which is wholly inappropriate and inconsistent with its current denial.

6. The request in Paragraph 14

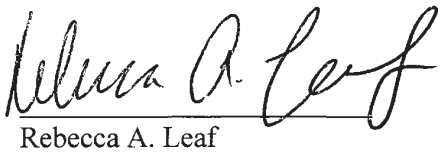
In light of Respondent's stipulation in its Petition that at material times, Michael Cetta and Steven Cetta were and are supervisors within the meaning of Section 2(11) of the Act, and agents of Respondent within the meaning of Section 2(13) of the Act, the General Counsel withdraws its request for documents pursuant to Paragraph 14 of the Subpoena.

CONCLUSION

For the reasons set forth above, the General Counsel respectfully requests that Respondent's Petition to Revoke the Subpoena *Duces Tecum* be denied in its entirety, and that Respondent be directed to produce all documents sought in the Subpoena.

Dated: September 29, 2015
New York, New York

Respectfully submitted,



Rebecca A. Leaf
Counsel for the General Counsel
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10278
Tel. (212) 264-0313

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

MICHAEL CETTA, INC. D/B/A SPARKS RESTAURANT

and **Case No. 02-CA-144852**

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 342

and

02-CA-142626

AFFIDAVIT OF SERVICE OF: GENERAL COUNSEL OPPOSITION TO RESPONDENT'S PETITION TO REVOKE SUBPOENA *DUCES TECUM* B-1-O96D9Z

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on September 29, 2015, I served the above-entitled document(s) upon the following persons, addressed to them at the following addresses:

By E-filing to:
The Honorable Lauren Esposito
National Labor Relations Board – Division of Judges
120 W. 45th Street, 11th Floor
New York, NY 10036

By Email:
Regina Faul, Esq.
Counsel for Respondent
By email to: RFaul@PhillipsNizer.com

Marc Zimmerman, Esq.
Counsel for Respondent
By email to: mzimmerman@phillipsnizer.com

Thomas Bianco, Esq.
Counsel for Respondent
By email to: tbianco@meltzerlippe.com

Dated at New York, New York
This 29th day of September, 2015

Rebecca A. Leaf

Rebecca A. Leaf
Counsel for the General Counsel
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, NY 10278
(212) 264-0493
Rebecca.Leaf@nlrb.gov

Exhibit A

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 2

MICHAEL CETTA, INC., d/b/a
SPARKS RESTAURANT
Respondent

Case Nos. 02-CA-142626
02-CA-144852

and

Subpoena B-1-O96D9Z

UFCW, Local 342

PETITION TO REVOKE SUBPOENA DUCES TECUM B-1-O96D9Z
PURSUANT TO SECTION 102.31(b) OF THE
NATIONAL LABOR RELATIONS BOARD RULES AND REGULATIONS

To: Hon. Lauren Esposito
Administrative Law Judge
National Labor Relations Board
26 Federal Plaza, Suite 3614
New York, NY 10278

Rebecca Leaf, Esq.
Counsel for the General Counsel
National Labor Relations Board
26 Federal Plaza, Suite 3614
New York, NY 10278-3699

Karen P. Fernbach, Esq.
Regional Director
Region 2, National Labor Relations Board
26 Federal Plaza, Suite 3614
New York, NY 10278

Pursuant to Section 102.31(b) of the National Labor Relations Board Rules and Regulations, Series 8, as amended, Meltzer, Lippe, Goldstein & Breitstone, LLP, and Phillips Nizer LLP, attorneys for Michael Cetta, Inc., d/b/a Sparks Restaurant (hereinafter referred to as "Respondent") hereby petitions that the Subpoena Duces Tecum, with attached Rider (collectively, the "Subpoena") served upon Respondent by the Counsel for the General Counsel ("General Counsel") *i.e.*, Subpoena B-1-O96D9Z) be revoked for the reasons discussed below,

including that the Subpoena is unreasonable in scope, overly broad, and unduly burdensome. A copy of the Subpoena is attached as **Exhibit "A"** hereto.

In support of its petition, Respondent also asserts:

(a) The Subpoena, which is returnable on October 5, 2015 was not received by Respondent until September 21, 2015.

(b) By way of background, the underlying unfair practice charges involve wait staff at Respondent's restaurant who were replaced following an economic strike. UFCW, Local 342 avers Respondent's decision was grounded upon unlawful *union animus* and as a result, a Complaint was issued against Respondent asserting Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act.

(c) Respondent fully has cooperated with Counsel for the General Counsel in the Region's investigation prior to the filing of the instant Complaint. Specifically, Respondent already has provided substantive information in response to each false, frivolous allegation of unlawful conduct, which Respondent categorically denies; Respondent has provided its managerial personnel for interview by the General Counsel as well as affidavits; Respondents have provided in excess of 25,000 pages of documents to the General Counsel at its request during its investigation leading up to the filing of the instant Complaint. Such documents include, without limitation, payroll documents and schedules for its wait staff employees from 2010 through early 2015, Respondent's profit and loss statements for the period 2010 through 2014 and employee handbook. For unknown reasons, General Counsel now demands production of the ***same*** documents, in addition to thousands more in categories having no relevance to this case (*e.g.*, documents pertaining non-wait staff employees who have nothing to do with the underlying Complaint allegations). Moreover, if it truly required additional information from Respondent prior to the hearing, General Counsel could have sought same in the months in

advance of this hearing, which was adjourned at General Counsel's request from July 27, 2015 to October 5, 2015. Additionally, General Counsel has made no effort to limit the information sought by the Subpoena to the allegations in the Complaint. Accordingly, the Subpoena is woefully overbroad and must be revoked in its entirety.

(d) The Subpoena seeks records for Respondent's non-wait staff employees (*e.g.* kitchen staff) who have no connection whatsoever to the allegations of the Complaint such as kitchen employees. By way of illustration, Subpoena document demand numbers five (5) and fourteen (14) seek documents for "all employees" – including "payroll documents" and "policies." Accordingly, the Subpoena seeks information that plainly is not relevant to any matter under investigation or in question in the proceeding, is unduly burdensome, unreasonable in scope, and overly broad given the number of employees who worked/work for Respondent during the time frame covered by the Subpoena.

(e) The Subpoena is overly broad, unduly burdensome, seeks information not relevant to any matter under investigation or in question in the proceeding and would entail an undue hardship to comply with by Respondent in that it seeks records for periods of time far preceding the time frame that could be considered remotely relevant to the underlying Complaint allegations. For example, requests 2, 4, 9, among others, seek records as far back as January 1, 2010 – nearly five years prior to the allegations in the Complaint.

(f) The Subpoena is overly broad, unduly burdensome, seeks information not relevant to any matter under investigation or in question in the proceeding and would entail an undue hardship to comply with by Respondent to the extent that a full response by Respondent would essentially require the production of literally every single document relating to all its waiters and bartenders from January 1, 2010 to the present, including, without limitation, payroll records (Subpoena Request 2) and weekly schedules (Subpoena Request 3).

(g) The Subpoena is overly broad, unduly burdensome, seeks information not relevant to any matter under investigation or in question in the proceeding and would entail an undue hardship to comply with by Respondent to the extent that a full response by Respondent would essentially require the production of literally every single document relating to an individual from his hire in 2014 (Subpoena Request 7 and 8).

(h) As mentioned previously, the Subpoena is vague, repetitive, overly broad, unduly burdensome and seeks information not relevant to any matter under investigation or in question in the proceeding in that General Counsel seeks documents reaching as far back as 2010 concerning non-wait staff employees who have no connection whatsoever to the allegations of the Complaint.

(i) No explanation has been provided by General Counsel for her request for Respondent's gross sales records from January 1, 2010 to the present (Subpoena Request 5). Even for purposes of determining jurisdictional coverage, the request is needlessly overbroad, as it would require the production of countless records (including, without limitation, customer receipts) not relevant to any matter under investigation or in question in the proceeding. In any event, to comply with this Subpoena Request, Respondent would have to produce countless records including every single customer receipt during this period of time. Notably, if this request is jurisdictional, General Counsel has not offered to withdraw this request in exchange for Respondent's admission that the Board has jurisdiction in this matter, as it did in Subpoena Request 11.

(j) As for Subpoena Request 11, Respondent stipulates Michael Cetta and Steven Cetta are supervisors/agents as defined by Section 2(11) and Section 2(13) of the National Labor Relations Act and amends its Answer accordingly. As for Valter Kapovic, Respondent references his affidavit previously provided to General Counsel wherein he describes his position

in regard to Section 2(11) and Section 2(13) of the National Labor Relations Act. Notwithstanding the foregoing, Subpoena Request 11 – including each of its ten subparts - is overly broad, unduly burdensome, repetitive and would cause Respondent an undue hardship to comply with same.

For the above reasons, the undersigned respectfully requests that the Subpoena be revoked forthwith.

Dated: Mineola, New York
September 25, 2015

Respectfully submitted,
Meltzer, Lippe, Goldstein & Breitstone, LLP

By: Thomas J. Bianco
Carmelo Grimaldi
Attorneys for Respondent
190 Willis Avenue
Mineola, New York 11501
Phone: (516) 747-0300
Fax: (516) 237-2893

Phillips Nizer LLP

By: Regina F. Faul
Marc B. Zimmerman
Attorneys for Respondent
666 Fifth Avenue
New York, New York 10103-0084
Phone: (212) 977-9700
Fax: (212) 262-5152

Exhibit B

(Reproduced herein at pp. A53 to A61)

Exhibit C

(Reproduced herein at pp. A35 to A40)

Exhibit D

(Reproduced herein at pp. A41 to A46)

Exhibit E

Leaf, Rebecca

From: Leaf, Rebecca
Sent: Tuesday, September 15, 2015 3:15 PM
To: Regina E. Faul; Marc Zimmerman
Subject: Michael Cetta d/b/a Sparks Restaurant, Case No. 02-CA-142626 and 02-CA-144852 - Subpoena duces tecum
Attachments: SUB.02-CA-142626.Packet Mailed on 9 15 15 Subpoena.pdf

Sensitivity: Personal

Flag Status: Completed

NxGen: Uploaded

Dear Regina and Marc,

Please find attached a subpoena *duces tecum*, which is being issued to your client today in connection with the above-referenced case. Please contact me with any questions, and please let me know if you'll be able to provide any of the above in advance of trial so we do not delay the hearing by reviewing documents before the record opens.

Thank you,

Rebecca A. Leaf
National Labor Relations Board, Region 2
26 Federal Plaza, Suite 3614
New York, NY 10278
phone (212) 264-0313
fax (212) 264-2450

Exhibit F

SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

The Custodian of Records
Michael Cetta Inc
d/b/a Sparks Restaurant
210 East 46th Street
New York, NY 10017

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☐ Addressee

B. Received by (*Printed Name*) NICK VEKIC C. Date of Delivery 8/19/15

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

NEW YORK N.Y. GRAND CENTRAL STATION AUG 19 2015

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number
(Transfer from service label) 7006 2760 0002 1737 0219

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

MICHAEL CETTA, INC. d/b/a
SPARKS RESTAURANT

and

Case Nos. 2-CA-142626
2-CA-144852

UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 342

ORDER DENYING RESPONDENT'S PETITION TO REVOKE

The Consolidated Complaint and Notice of Hearing in this matter, issued on May 29, 2015, alleges that Michael Cetta, Inc. d/b/a Sparks Restaurant ("Sparks" or "Respondent") violated Sections 8(a)(1) and (3) of the Act by failing and refusing to reinstate striking employees despite an unconditional offer to return to work on December 19, 2014, discharging the striking employees on December 22, 2014, and refusing to place the employees on a preferential hiring list. The Consolidated Complaint also alleges that on December 6, 2014, Sparks solicited employees to withdraw their support for United Food and Commercial Workers Local 342 (the "Union"), in violation of Section 8(a)(1). Sparks filed an Answer on June 12, 2015, denying the Complaint's material allegations.

On or about September 15, 2015, Counsel for the General Counsel ("General Counsel") served Sparks with a Subpoena *Duces Tecum*. On September 25, 2015, Sparks filed a Petition to Revoke the Subpoena, and on September 29, 2015, General Counsel filed an Opposition. For the following reasons, Sparks' Petition to Revoke is denied, and Sparks is ordered to produce documents in the manner set forth below.

A. General Legal Principles

Under Section 102.31(b) of the Board's Rules and Regulations, documents sought via Subpoena should be produced so long as they relate to any matter in question, or can provide background information or lead to other potentially relevant evidence. *See Perdue Farms*, 323 NLRB 345, 348 (1997), *aff'd. in relevant part*, 144 F.3d 830, 833-834 (D.C. Cir. 1998) (information need only be "reasonably relevant"). Under Rule 26(b) of the Federal Rules of Civil Procedure, referred to by the Board in deciding such issues, information sought must only be "reasonably calculated to lead to the discovery of relevant evidence." *See Brinks, Inc.*, 281 NLRB 468 (1986).

The Consolidated Complaint in this case alleges violations of the rights of economic strikers pursuant to *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enf'd.* 414 F.2d 99 (7th Cir. 1969). Under *Laidlaw Corp.*, economic strikers are entitled to immediate reinstatement to their former positions after making an unconditional offer to return to work, absent a "legitimate and substantial" business justification. *Supervalu, Inc.*, 347 NLRB 404, 405 (2006). The burden of proving a legitimate and substantial business justification for failing to reinstate economic strikers lies with the employer. *Supervalu, Inc.*, 347 NLRB at 405, citing *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967); *Peerless Pump Co.*, 345 NLRB 371, 375 (2005). The hiring of permanent replacement employees prior to the unconditional offer to return to work constitutes a legitimate and substantial business justification. *Supervalu, Inc.*, 347 NLRB at 405; *Peerless Pump Co.*, 345 NLRB at 375. In the event that no vacancy in the striking employees' classifications exists, the employer is required to place them "on a nondiscriminatory recall list until a vacancy occur[s]." *Peerless Pump Co.*, 345 NLRB at 375.

B. General Objections to the Subpoena

Information Previously Provided During the Investigation: Sparks contends that the Subpoena is overly broad and must be revoked in its entirety on the grounds that it provided at least some of the information sought via the Subpoena to the Region during the investigation of the instant charges. Sparks' having previously provided certain materials to the Region does not obviate the requirement that all of the information sought be produced at this time pursuant to Subpoena. As a result, Sparks' Petition to Revoke the Subpoena on this basis is denied.

In addition, General Counsel states that many of the documents provided by Sparks during the investigation contained information which was redacted for unexplained reasons. Sparks is therefore ordered to provide unredacted copies of all requested documents, unless the information is subject to attorney-client privilege or the attorney work product doctrine. In that event, Sparks is to provide a privilege log, as discussed in Paragraph E of the Instructions to the Attachment. *See CNN America, Inc.*, 352 NLRB 448, 448-449 (2008) and 353 NLRB 891, 899 (2009).

Production of Documents Would Be Unduly Burdensome: Sparks petitions to revoke the Subpoena, and Paragraphs 2, 3, 4, 5, 7, 8, 9, 11, and 14 in particular, on the grounds that production of the information they seek would be unduly burdensome. However, a bald assertion that production of requested documents would be "unduly burdensome" is insufficient to establish grounds for revoking these Paragraphs on that basis. *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986) (revocation of subpoena as unduly burdensome requires a showing that producing the requested documents would "seriously disrupt" normal business operations); *see also NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 513 (4th Cir. 1996). As a result, Respondent's Petition to Revoke these Paragraphs on this basis is denied.

C. Specific Paragraphs

Paragraphs 2 and 3: These Paragraphs require the production of information regarding the identities, work hours, schedules, and rates of pay for all employees (regular and seasonal) employed as waiters and bartenders during the periods January 1, 2010 and October 1, 2014 to the present. Sparks contends that these Paragraphs seek irrelevant information, primarily because the January 1, 2010 date encompasses a time period inapposite to the events which form the basis for the Consolidated Complaint's allegations. I note that Paragraph 3 requires the production of documents only for the period October 1, 2014 to the present, and thus seeks information directly relevant to the identities of employees performing work in the pertinent job classifications before and after the inception of the strike and the unconditional offer to return to work. General Counsel states that the information sought in Paragraph 2 is relevant to Sparks' contention that there was already a full complement of employees in the pertinent job classifications at the time of the unconditional offer to return to work, and as such there was no available work in these positions. General Counsel states that it seeks the production of documents beginning as of January 1, 2010 in order to determine Sparks' typical pattern or practice with respect to staffing in the pertinent job classifications prior to the inception of the strike.

I find that the information sought in Paragraphs 2 and 3 of the Attachment is relevant to the Consolidated Complaint's allegations. Sparks' Petition to Revoke these Paragraphs is therefore denied. I note that on pages 5-6 of her Opposition to Sparks' Petition to Revoke, General Counsel states that she will accept a list of specific documents maintained by Sparks, in unredacted form, as a provisional response to Paragraphs 2, 3, 5, 8 and 9 of the Attachment. I will order the production of these documents in unredacted form, for the period January 1, 2010 to the present.

Paragraph 4: This Paragraph requires the production of documents showing Sparks' gross sales for the period January 1, 2010 to the present time. Sparks contends that General Counsel has not provided any explanation as to why this information is relevant, and that the time period involved is overly broad. General Counsel states that during the investigation, Sparks argued that due to a downturn in its business fewer employees were required, and as a result reinstatement of the striking employees after the unconditional offer to return to work was not necessary. As a result, this information is relevant to one of Sparks' previously asserted defenses, and Sparks' Petition to Revoke Paragraph 4 is denied.

Paragraph 5: Paragraph 5 requires the production of documents relevant to the hiring and subsequent employment of all employees during the period October 1, 2014 to the present. Sparks argues that such documents are irrelevant to the extent that they pertain to employees outside the job classifications which participated in the strike. General Counsel contends that the information is relevant to Sparks' defense that it did not need to reinstate the striking employees because a downturn in its business resulted in a decreased need for overall staff. I find that the materials sought in Paragraph 5 are relevant to this defense, and Sparks' Petition to Revoke this Paragraph

is therefore denied. As discussed above, General Counsel has offered to resolve the issue by accepting certain specific documents, which I will incorporate into my order.

Paragraphs 7, 8, 9 and 10: Paragraphs 7-10 seek information regarding Sparks' hiring of a banquet manager on or about December 12, 2014 to deal exclusively with private parties. Sparks contends that the information sought is irrelevant in that Paragraph 9 requires the production of documents regarding banquet managers, if any, employed during the period January 1, 2010 to the present, and that Paragraphs 7, 8, and 10 are overbroad. General Counsel states that during the investigation Sparks claimed that it did not reinstate the striking employees because the hiring of a banquet manager reduced its need for waiters and bartenders. The information sought in these Paragraphs is therefore relevant to the Consolidated Complaint's allegations, and Sparks' Petition to Revoke them is denied. With respect to Paragraphs 8 and 9, Sparks need only produce documents identified by General Counsel on pages 5-6 of its Opposition, as per my order.

Paragraphs 11 and 14: Paragraph 11 relates to the responsibilities and terms and conditions of employment for Michael Cetta, Steven Cetta, and Valter Kapovic. The Complaint alleges that Michael and Steven Cetta, Sparks' President and Vice President, and Kapovic, Sparks' Maitre'd, are supervisors within the meaning of Section 2(11) of the Act, and agents of Sparks acting on its behalf. In its Petition to Revoke, Sparks stipulates that Michael and Steven Cetta are statutory supervisors and agents under the Act; General Counsel has therefore withdrawn its demand for documents regarding the Cettas.[1] However, Sparks makes no such stipulation with respect to Kapovic, who allegedly solicited employees to withdraw their support for the Union, and the information sought in Paragraph 11 is relevant to the allegation that he is a statutory supervisor or agent of Respondent. As a result, the materials sought in Paragraph 11 must be produced with respect to Kapovic.

For all of the foregoing reasons, Respondent's Petition to Revoke the Subpoena *Duces Tecum* is denied. Sparks is hereby ordered to produce the following documents, unredacted as discussed above:

1. Employee hours summary (weekly) for the period January 1, 2010 to the present.
2. Weekly payroll records for the period January 1, 2010 to the present.
3. Lunch and Dinner Tips (weekly), which is a grid listing typed employee names, day of the week, and tips earned each day, for the period January 1, 2010 to the present.
4. Daily Tip Sheet, which shows lunch and dinner columns next to one another, with employee typed names in both, and handwriting to either check off who worked that day, or to cross off who did not work, for the period January 1, 2010 to the present. There is a shaded area on this page that says, "Please do not write anything in the shaded area."
5. Untitled document, which upon General Counsel's information and belief is the dinner schedule, which lists employee names (typed), days of the week, and

[1] General Counsel has withdrawn Paragraph 14 of the Attachment to the Subpoena on this basis as well.

handwritten notes with who works at what time (i.e., "C" for closing or a dot for another shift, "X" when not scheduled), along with the closing managers at the bottom, "Money Matters" at the bottom, for the period January 1, 2010 to the present.

6. Daily schedules (usually written by Manager and Maitre'd Musa Hoxha), on which he writes the names of employees and the section of the restaurant they will work in that particular shift, for the period January 1, 2010 to the present.
7 All documents responsive to Paragraphs 1, 4, 6, 7, 10, 12, and 13 of the Attachment to the Subpoena.
8. All documents responsive to Paragraph 11 of the Subpoena with respect to Valter Kapovic only.

Dated: New York, New York
September 30, 2015

Lauren Esposito
Administrative Law Judge

KAREN P. FERNBACH, Regional Director,
Region 2, National Labor Relations Board,
For and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

-against-

MICHAEL CETTA D/B/A SPARKS RESTAURANT

Respondent

----------X

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between Karen P. Fernbach, Regional Director of Region 2 ("the Regional Director") of the National Labor Relations Board, for and on behalf of the National Labor Relations Board ("the Board") and Michael Cetta d/b/a Sparks Restaurant ("Respondent"), by their respective attorneys that:

1. The Regional Director, having authorization from the Board to file a petition in the United States District Court for the Southern District of New York pursuant Section 10(j) of the National Labor Relations Act ("the Act"), 29 U.S.C. Section 160(j), seeking a temporary injunction against Respondent pending the final administrative disposition of certain unfair labor practice charges now pending before the Board, from violating Section 8(a)(1) and (3) the Act, 29 U.S.C. Sections 158(a)(1) and (3) of the Act, enters into this Stipulation with Respondent:

2. In consideration of the following undertakings of Respondent set forth in this Stipulation, the Regional Director has agreed not to file the petition pursuant to Section 10(j) of the Act, provided that Respondent adheres to the terms of this Stipulation.

3. The parties further agree that Respondent, pending the Board's final administrative adjudication of NLRB Cases 02-CA-142626 and 02-CA-144852 will engage in the following affirmative conduct:

   a. Within 5 days of the signing of this Stipulation, offer immediate reinstatement to eight (8) eligible employees, in writing and per their *Laidlaw* rights, to positions not filled by and/or vacated by permanent replacements since December 19, 2014;

   b. Continue to maintain its preferential recall and reinstatement list, annexed hereto, and utilize that list exclusively to recall former strikers on a nondiscriminatory basis to fill any available waiter or bartender position. To the extent waiter or bartender positions are vacated and not filled, the burden is on Respondent to establish a legitimate and substantial business justification for not filling the positions, and Respondent will provide records to the Regional Director to substantiate its justification;

   c. Provide the Regional Director with weekly payroll records for waiters and bartenders;

   d. Within 5 days of the signing of this Stipulation, post copies of this Stipulation in all locations where other notices to employees are customarily posted, maintain the postings during the pendency of the Board's administrative process free from all obstructions and defacements, and grant to agents of the Board reasonable access to these facilities in order to monitor compliance with the posting requirements;

   e. Within 5 days of the signing of this Stipulation, mail copies of the Stipulation to the home addresses of all waiters and bartenders who have not returned to work for Respondent; and

   f. Within 20 days of the signing of this Stipulation, file, with a copy submitted to the Regional Director, a sworn affidavit from a responsible official of Respondent, setting forth with specificity the manner in which it has complied with the terms of this Stipulation, including the location of the posting required by the Stipulation.

4. The parties further agree that Respondent, pending the Board's final administrative adjudication of NLRB Cases 02-CA-142626 and 02-CA-144852 will cease and desist from:

   a. Failing and refusing to return eligible employees, per their *Laidlaw*[1] rights, to positions never filled by permanent replacements or positions vacated by permanent replacements since December 19, 2014;

   b. Discharging or otherwise discriminating against employees because of their Section 7 activities; and

   c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

5. The parties further agree that if, upon investigation, the Board concludes that there is reasonable cause to believe that Respondent, after the date of the signing of this Stipulation, has failed to perform any of the acts or conduct set forth in paragraph 3 above, or has resumed any of the acts or conduct described in paragraph 4 above:

   a. The Board shall file the petition pursuant to Section 10(j) with the United States District Court for the Southern District of New York ("the Court"), and request an expedited hearing to be conducted no less than seven (7) days after said motion is filed, for the sole purpose of determining whether Respondent has breached this Stipulation; and

   b. If the Court concludes that Respondent has breached this Stipulation, Respondent shall not contest whether reasonable cause exists as to whether Respondent has violated the Act as alleged above in Paragraph 1, nor shall Respondent contest that interim injunctive relief is otherwise just and proper, and Respondent agrees

[1] *Laidlaw Corp.*, 171 NLRB 1366 (1968), aff'd 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

that the Court shall enter a temporary injunctive order to require Respondent, pending the Board's final administrative adjudication of NLRB Cases 02-CA-142626 and 02-CA-144852, to comply with the affirmative conduct described above in paragraph 3 and to cease and desist from the conduct as described above in paragraph 4.

6. If the administrative law judge issues a decision in this matter recommending dismissal of the alleged unfair labor practices alleged in the Complaint and no party files timely exceptions with the Board to that decision, this Stipulation reached with Respondent will be dissolved and will no longer be enforceable. If any party files timely exceptions to the administrative law judge's recommendation to dismiss the alleged unfair labor practices alleged in the Complaint and the Board issues a decision affirming the administrative law judge's recommendation, this Stipulation reached with Respondent will be dissolved and will no longer be enforceable.

7. This Stipulation shall not be construed in any way to be an admission by the parties with respect to liability or their respective claims or defenses, nor will this Stipulation be used as evidence that Respondent has violated the Act.

Dated at New York, New York
This 9TH day of October, 2015.

Karen P. Fernbach Esq., Regional Director
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, NY 10278
Telephone (212) 264-0313
Fax (212) 264-2450

Marc B. Zimmerman, Esq.
Phillips Nizer LLP
666 Fifth Avenue
New York, NY 10103-0084
Telephone (212) 841-0512
Fax (212) 262-5152
Counsel for Respondent

Preferential Rehire List

Employee Name	Dept/Cost Center	Date_of_Hire	Last day worked
Nuredini, Adnan	Bartenders	21-Jul-95	10-Dec-14
Ivce, Ante	Waiters	2-Apr-97	10-Dec-14
Lustica, Silvio	Waiters	1-Aug-97	10-Dec-14
Karahoda, Jeton	Waiters	1-Jun-98	10-Dec-14
Alarcon, Gerardo Jose	Waiters	29-Feb-00	10-Dec-14
Iriarte, Juan A.	Waiters	5-Apr-00	10-Dec-14
Spahija, Fatlum	Waiters	29-Aug-00	10-Dec-14
Prelvukaj, Sadik	Waiters	1-Dec-01	10-Dec-14
Zeqiraj, Mergim	Waiters	22-Jul-02	10-Dec-14
Lamniji, Rachid	Waiters	5-Aug-02	10-Dec-14
Hoxhaj, Elvi	Bartenders	21-Oct-02	10-Dec-14
Neziraj, Xhavit	Waiters	29-Mar-04	10-Dec-14
Lokaj, Valon	Waiters	7-Feb-05	10-Dec-14
Mushkolaj, Iber	Waiters	21-Feb-05	10-Dec-14
Collins, Ian	Waiters	12-May-05	10-Dec-14
Resulbegu, Nagip	Waiters	21-Nov-05	10-Dec-14
Cutra, Elvis	Waiters	22-May-06	10-Dec-14
Tagani, Alim	Waiters	27-Nov-06	10-Dec-14
Fuller, Kristofer S.	Waiters	19-Feb-07	10-Dec-14
El Idrissi, Youssef S.	Waiters	30-Jun-08	10-Dec-14
Neziraj, Kenan	Waiters	2-Sep-08	10-Dec-14
Hajdini, Valjon	Waiters	22-Sep-08	10-Dec-14
Demaj, Arlind	Waiters	21-Oct-08	10-Dec-14
Kukaj, Milazim	Waiters	23-Nov-09	10-Dec-14
Neziraj, Gani	Waiters	1-Dec-09	10-Dec-14
Seddiki, Khalid	Waiters	9-Apr-10	10-Dec-14
Jakupi, Amir	Waiters	27-Sep-11	10-Dec-14
Albarracin, Fredy Y.	Waiters	17-Oct-11	10-Dec-14
Patino, Juan Manuel	Waiters	21-Nov-11	10-Dec-14
Stepien, Andrzej R.	Waiters	14-Aug-12	10-Dec-14
Gjevukaj, Adem	Waiters	4-Sep-12	10-Dec-14
Beljan, Marko	Waiters	22-Oct-12	10-Dec-14
Puente, Francisco	Waiters	12-Nov-12	10-Dec-14
Kelmendi, Bardhyl	Waiters	19-Nov-12	10-Dec-14
Qelia, Ermal	Waiters	18-Nov-13	10-Dec-14
Campanella, James	Waiters	25-Nov-13	10-Dec-14

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of	:	
	:	
Michael Cetta, *Inc.* d/b/a	:	
Sparks Steak House,	:	Case Nos.: 02-CA-142626
	:	02-CA-144852
Respondent,	:	
	:	
and	:	
	:	
United Food and Commercial	:	
Workers, Local 342,	:	
	:	
Charging Party.	:	

RESPONDENT MICHAEL CETTA, *INC.* d/b/a/ SPARKS STEAK HOUSE'S MOTION TO REOPEN THE RECORD PURSUANT TO 29 C.F.R. §102.48(b)

PHILLIPS NIZER LLP
Marc B. Zimmerman
Regina E. Faul
Kathryn T. Lundy
666 Fifth Avenue
New York, New York 10103-0084
Tel: (212) 977-9700
Fax: (212) 262-5152

PUTNEY, TWOMBLY, HALL & HIRSON LLP
Mark A. Hernandez
521 Fifth Avenue
New York, New York 10175
Tel: (212) 682-0020
Fax: (212) 682-9380

Attorneys for Respondent

Respondent Michael Cetta *Inc.*, d/b/a Sparks Steak House ("Sparks"), hereby moves, pursuant to 29 C.F.R. §102.48(b), to reopen the record and submit the tip records (annexed hereto as Exhibit A) for Sparks' service employees for the weeks immediately preceding Local 342, UFCW's (the "Union") December 19, 2014 unconditional offer to return the Striking Employees to work following their commencement of an economic strike. In support of its motion to reopen the record, Sparks states the following:

1. On September 15, 2015, the GC served upon Sparks NLRB Subpoena Duces Tecum B-1-O96D9Z (the "Subpoena") seeking various payroll and tip records for Sparks' employees.

2. On October 7, 2015, Sparks produced documents to the GC in response to the Subpoena which included documents Bates-stamped MCI049240 – MCI049241, MCI049246 – MCI049255 and MCI049259, annexed hereto as Exhibit A.

3. Despite that Sparks *had produced* the Subpoenaed documents, the GC falsely misrepresented to the ALJ in its Post-Hearing Brief that Sparks had *failed to produce* the above-referenced documents and therefore an adverse inference should be drawn against Sparks.

4. Relying upon, and misled by, the GC's false misrepresentation, the ALJ drew an adverse inference against Sparks based upon Sparks' purported "failure" to produce the annexed documents.

5. Such adverse inference was prejudicial to Sparks as it resulted in the ALJ's improper (and erroneous) determination that permanent replacement workers *did not* work at Sparks prior to the Striking Employees' unconditional offer of return to work. The documents produced to the GC demonstrate otherwise.

6. The ALJ opined that had the annexed documents been produced to the GC (which they had), they would tend to show the Striking employees *were* permanently replaced prior to the Striking Employees' unconditional offer of return to work.

7. Justice dictates that the record be opened so that the documents annexed hereto as Exhibit A, can be duly considered by the Board.

8. Submitted herewith is a Sparks' Brief in Support of its Motion to Reopen the Record Pursuant to 29 C.F.R. §102.48(b).

Dated: New York, New York
March 24, 2017

PHILLIPS NIZER LLP

By: _____
Marc B. Zimmerman
Regina E. Faul
Kathryn T. Lundy
666 Fifth Avenue
New York, New York 10103-0084
Tel: (212) 977-9700
Fax: (212) 262-5152

PUTNEY, TWOMBLY, HALL & HIRSON LLP

By: _____
Mark A. Hernandez
521 Fifth Avenue
New York, New York 10175
Tel: (212) 682-0020
Fax: (212) 682-9380

Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned, a partner at Phillips Nizer LLP, attorneys for Respondents herein, certifies that on March 24, 2017, she electronically filed the foregoing RESPONDENT MICHAEL CETTA, INC. d/b/a/ SPARKS STEAK HOUSE'S MOTION TO REOPEN THE RECORD PURSUANT TO 29 C.F.R. §102.48(b) via the National Labor Relations Board electronic filing system and placed a copy of same in a Federal Express Box and/or Envelope, postage prepaid, and addressed as follows:

Office of the Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001
(Original and 8 copies)

Rebecca A. Leaf, Esq.
Counsel for the General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10278-0104
(1 copy)

Martin L. Milner
Simon & Milner
99 West Hawthorne Avenue
Suite 308
Valley Stream, NY 11580
(1 copy)

UFCW Local 342
166 E. Jericho Turnpike
Mineola, NY 11501L
(1 copy)

Regina E. Faul

1301428.1

EXHIBIT A

Michael Cetta, Inc.
Lunch & Dinner Tips
From: 12/08/14 TO 12/12/14

Names	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Total Tips	Charge
Adam	365.87	211.00	323.66	-	-	-	900.53	23.86
Al	483.49	211.00	323.66	-	-	-	1,018.15	26.98
Amir	483.49	211.00	323.66	-	-	-	1,018.15	26.98
Anaas	365.87	313.59	323.66	-	-	-	1,003.12	26.58
Andre	365.87	211.00	448.51	-	-	-	1,025.38	27.17
Andy	365.87	211.00	323.66	-	-	-	900.53	23.86
Ante	365.87	211.00	448.51	-	-	-	1,025.38	27.17
Arlino	365.87	211.00	323.66	-	-	-	900.53	23.86
Bardhyl	365.87	211.00	323.66	-	-	-	900.53	23.86
Behram	365.87	211.00	448.51	-	-	-	1,025.38	27.17
Carlos	365.87	211.00	323.66	-	-	-	900.53	23.86
Chris	365.87	313.59	323.66	-	-	-	1,003.12	26.58
Elvis	483.49	211.00	323.66	-	-	-	1,018.15	26.98
Emal	365.87	211.00	448.51	-	-	-	1,025.38	27.17
Francisco	365.87	313.59	323.66	-	-	-	1,003.12	26.58
Fredy	365.87	313.59	323.66	-	-	-	1,003.12	26.58
Gerardo	365.87	211.00	323.66	-	-	-	900.53	23.86
Gianni	365.87	211.00	323.66	-	-	-	900.53	23.86
Gipa	483.49	211.00	323.66	-	-	-	1,018.15	26.98
Ian	365.87	211.00	323.66	-	-	-	900.53	23.86
Iber	365.87	313.59	323.66	-	-	-	1,003.12	26.58
James	365.87	211.00	323.66	-	-	-	900.53	23.86
Jay	365.87	211.00	323.66	-	-	-	900.53	23.86
Jimmy	365.87	211.00	323.66	-	-	-	900.53	23.86
Joanna	-	-	-	-	-	-	-	-
Juan	-	211.00	323.66	-	-	-	534.66	14.17
Juan II	365.87	211.00	323.66	-	-	-	900.53	23.86
Kenan	365.87	211.00	323.66	-	-	-	900.53	23.86
Khalid	-	211.00	448.51	-	-	-	659.51	17.48
Lucky	365.87	211.00	323.66	-	-	-	900.53	23.86
Luis	365.87	211.00	448.51	-	-	-	1,025.38	27.17
Luis II	365.87	313.59	323.66	-	-	-	1,003.12	26.58
Marco	365.87	211.00	323.66	-	-	-	900.53	23.86
Mlazim	-	211.00	323.66	-	-	-	534.66	14.17
Mostafa	365.87	211.00	323.66	-	-	-	900.53	23.86
Rashid	365.87	211.00	323.66	-	-	-	900.53	23.86
Sadik	365.87	211.00	323.66	-	-	-	900.53	23.86
Sayed	365.87	211.00	448.51	-	-	-	1,025.38	27.17
Silvio	483.49	211.00	323.66	-	-	-	1,018.15	26.98
Val	483.49	211.00	323.66	-	-	-	1,018.15	26.98
Valon	365.87	211.00	323.66	-	-	-	900.53	23.86
Xavit	365.87	211.00	448.51	-	-	-	1,025.38	27.17
Yousef	483.49	211.00	323.66	-	-	-	1,018.15	26.98
	-	-	-	-	-	-	-	-
	-	-	-	-	-	-	-	-
	-	-	-	-	-	-	-	-
Beklm	282.09	213.02	198.89	-	-	-	674.00	17.86
Elvi	237.09	213.02	198.89	-	-	-	649.00	17.20
Adnan	237.09	342.02	274.39	-	-	-	853.50	22.62
Abdou	-	-	-	-	-	-	-	-
Musa	-	-	-	-	-	-	-	-
Walter	-	-	-	-	-	-	-	-
Ricardo	-	-	-	-	-	-	-	-
Total	15,828.54	10,245.60	15,264.69	-	-	-	41,338.83	1,095.48

Michael Cetta, Inc.
Lunch & Dinner Tips
From: 12/08/14 TO 12/12/14

Names	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Total Tips	Charge
Adam								
Al								
Amir								
Anass				1,144.56	1,098.56	481.49	2,724.61	72.20
Andre								
Andy				1,144.56	882.17	481.49	2,508.22	66.47
Anta								
Arlind								
Bardhyl								
Bikram				1,144.56	1,098.56	481.49	2,724.61	72.20
Carlos				1,144.56	1,098.56	481.49	2,724.61	72.20
Chris								
Ekle								
Emrul								
Francisco								
Fredy								
Gerardo								
Gianni								
Giga								
Ian								
Iber								
James								
Jay								
Jimmy								
Joanna								
Juan								
Juan II								
Kenan								
Khalid								
Lucky								
Luis				1,144.56	1,098.56	481.49	2,724.61	72.20
Luis II				1,144.56	1,098.56	481.49	2,724.61	72.20
Marco								
Mazim								
Mekele				1,144.56	882.17	481.49	2,508.22	66.47
Rashid								
Sadik								
Sayed				1,144.56	1,098.56	481.49	2,724.61	72.20
Silvio								
Val								
Valon								
Xavil								
Yousef								
Oscar				381.52	308.19	160.50	906.21	24.07
Andreas				381.52	294.06	160.50	836.08	22.16
Hugo Rios				381.52	294.06	160.50	836.08	22.16
Hector				381.52	294.06	160.50	836.08	22.16
Maher				332.89			332.89	8.82
Luisa				332.89	294.06	160.50	787.45	20.87
Sky				332.89	294.06	160.50	787.45	20.87
Majid				332.89	294.06	160.50	787.45	20.87
Halil				332.89	308.19	160.50	859.58	22.78
tanner				332.89	294.06	160.50	787.45	20.87
Helene				332.89		160.50	493.39	13.07
Luis III				332.89	308.19	160.50	859.58	22.78
Freddy				332.89	294.06	160.50	787.45	20.87
Yavor				332.89	294.06	160.50	787.45	20.87
Javier				332.89			332.89	8.82
Christian				332.89			332.89	8.82
Junior				332.89	294.06	160.50	787.45	20.87
Miguel P.				332.89	294.06	160.50	787.45	20.87
Rafael				332.89	294.06	160.50	787.45	20.87
Pablo				332.89	294.06	160.50	787.45	20.87
Miguel F.					294.06	160.50	454.56	12.05
Edward					294.06	160.50	454.56	12.05
Max					294.06	160.50	454.56	12.05
Jose Pluma					294.06	160.50	454.56	12.05
Jose Luis						160.50	160.50	4.25
Maudi						160.50	160.50	4.25
Oscar II				745.16	467.43	232.14	1,444.73	38.29
Bekim								
Eld								
Adnan								
Mike DiSimon				326.58	121.72		448.30	11.88
Chris				326.58	25.00		351.58	9.32
Trever						116.38	116.38	3.08
Mike					121.72		121.72	3.23
Abdou								
Musa								
Walter								
Ricardo								
Total				17,740.01	15,483.22	8,052.44	41,275.67	1,093.61

Letter
Not on List (12/12)

THH Alex
TH Rueben
TL KYLE
TBB Ozcan
TA Ian

MCI049241

D. 188.03 - 4.03
B. _____

Lunch

Daily Tip Sheet
Day: MONDAY
Date: 12-08-14

No. of Waiters: 7

1 Adem	✓
2 Al	✓
3 Amir	✓
4 Anass	
5 Andre	
6 Andy	
7 Ante	
8 Arlino	
9 Bardhyl	
10 Behram	
11 Carlos	
12 Chris	✓
13 Elvis	✓
14 Ermal	
15 Francisco	
16 Fredy	
17 Gerardo	
18 Gianni	✓
19 Gipa	✓
20 Ian	
21 Iber	
22 James	
23 Jay	
24 Jimmy	
25 [redacted]	
26 Juan	
27 Juan II	
28 Kenan	
29 Khalid	
30 Lucky	
31 Luis	
32 Luis II	
33 Marco	
34 Milazim	
35 Mostafa	
36 Rashid	
37 Sadik	
38 Sayed	✓
39 Silvio	✓
40 Val	✓
41 Valon	
42 Xavit	
43 Youssef	✓
44	
45	
46	

848.34
-225.00
623.34
7€ 117.62

Please do not write anything in the shaded area.

	Transfer	Credit Card Tip
[redacted]		
Beklm ✓		$ 25
[redacted]		

Please Do not cut this sheet in Half

D. 1664.31 - 6.41
B. 191.89 - 9.60

Dinner

Daily Tip Sheet
Day: Monday
Date: 12.08.14

No. of Waiters: 39

1 Adem	
2 Al	
3 Amir	
4 Anass	
5 Andre	
6 Andy	
7 Ante	
8 Arlino	
9 Bardhyl	
10 Behram	
11 Carlos	
12 Chris	
13 Elvis	
14 Ermal	
15 Francisco	
16 Fredy	
17 Gerardo	
18 Gianni	
19 Gipa	
20 Ian	
21 Iber	
22 James	
23 Jay	
24 Jimmy	
25 [redacted]	
26 Juan	
27 Juan II	
28 Kenan	
29 Khalid	
30 Lucky	
31 Luis	
32 Luis II	
33 Marco	
34 Milazim	
35 Mostafa	
36 Rashid	
37 Sadik	
38 Sayed	
39 Silvio	
40 Val	
41 Valon	
42 Xavit	
43 Youssef	
44	
45	
46	

14820.35
-501.72
14318.63
39€ 365.87

Please do not write anything in the shaded area.

	Transfer	Credit Card Tip
	551.72	159.54
Adnan ✓	183.91	53.18
Bekim ✓	183.91	53.18
Elvi ✓	183.91	53.18

Please Do not cut this sheet in Half

MCI049246

D. 88.62 - 2.22 **Lunch**
B. 84.22 - 12.64

Daily Tip Sheet
Day: TUESDAY
Date: 12-09-14

No. of Waiters: 6

1 Adem		
2 Al		
3 Amir ✓		
4 Anass ✓		
5 Andre		
6 Andy		
7 Ante		
8 Arlino		
9 Bardhyl		
10 Behram		
11 Carlos ✓		
12 Chris ✓		
13 Elvis		
14 Ermal		
15 Francisco ✓		
16 Fredy ✓		
17 Gerardo	*Please do not write anything in the shaded area.*	
18 Gianni		
19 Gipa		
20 Ian ✓	Transfer	Credit Card Tip
21 Iber ✓		
22 James		
23 Jay		
24 Jimmy	Adnan ✓	#36 + #93
25 [redacted]		
26 Juan	Bekim	
27 Juan II		
28 Kenan	Elvi	
29 Khalid		
30 Lucky		
31 Luis		
32 Luis II ✓		
33 Marco		
34 Milazim		
35 Mostafa		
36 Rashid		
37 Sadik		
38 Sayed		
39 Silvio		
40 Val		
41 Valon		
42 Xavit		
43 Youssef	*Please Do not cut this sheet in Half*	
44		
45		
46		

651.50
-36.00
615.50
6@102.59

D. 3025.31 - 1081 **Dinner**
B. 91.29 - 4.57

Daily Tip Sheet
Day: THUR
Date: 12.09.14

No. of Waiters: 42

1 Adem		
2 Al		
3 Amir		
4 Anass		
5 Andre		
6 Andy		
7 Ante		
8 Arlino		
9 Bardhyl		
10 Behram		
11 Carlos		
12 Chris		
13 Elvis		
14 Ermal		
15 Francisco		
16 Fredy		
17 Gerardo	*Please do not write anything in the shaded area.*	
18 Gianni		
19 Gipa		
20 Ian	Transfer	Credit Card Tip
21 Iber	333.68	395.37
22 James		
23 Jay		
24 Jimmy	Adnan ✓	111.23 + 101.79
25 [redacted]		
26 Juan	Bekim ✓	111.23 + 101.79
27 Juan II		
28 Kenan	Elvi ✓	111.23 + 101.79
29 Khalid		
30 Lucky		
31 Luis		
32 Luis II		
33 Marco		
34 Milazim		
35 Mostafa		
36 Rashid		
37 Sadik		
38 Sayed		
39 Silvio		
40 Val		
41 Valon		
42 Xavit		
43 Youssef	*Please Do not cut this sheet in Half*	
44		
45		
46		

9195.68
-333.68
8862.00
42@211.00

MC1049247

D. 631.88-11.85
B. 13.95-2.10

Lunch

Daily Tip Sheet
Day: WEDNESDAY
Date: 12-10-14

No. of Waiters: 8

1 Adem
2 Al
3 Amir
4 Anass ✓
5 Andre ✓
6 Andy ✓
7 Ante ✓
8 Arlino
9 Bardhyl ✓
10 Behram ✓
11 Carlos
12 Chris
13 Elvis ✓
14 Ermal ✓
15 Francisco
16 Fredy
17 Gerardo
18 Gianni
19 Gipa
20 Ian
21 Iber
22 James
23 Jay
24 Jimmy
25 [redacted]
26 Juan
27 Juan II
28 Kenan ✓
29 Khalid ✓
30 Lucky
31 Luis ✓
32 Luis II
33 Marco
34 Milazim
35 Mostafa
36 Rashid
37 Sadik
38 Sayed ✓
39 Silvio
40 Val
41 Valon ✓
42 Xavit ✓
43 Youssef
44
45
46

1041.28
42.50
998.78
8 @ 124.85

Please do not write anything in the shaded area.

	Transfer	Credit Card Tip
Adnan ✓		$42.50 + 33
[redacted]		
[redacted]		

Please Do not cut this sheet in Half

D. 2071.67-71.40
B. 1046.54-156.99

Dinner

Daily Tip Sheet
Day: Wed
Date: 12.10.14

No. of Waiters: 42

1 Adem
2 Al
3 Amir
4 Anass
5 Andre
6 Andy
7 Ante
8 Arlino
9 Bardhyl
10 Behram
11 Carlos
12 Chris
13 Elvis
14 Ermal
15 Francisco
16 Fredy
17 Gerardo
18 Gianni
19 Gipa
20 Ian
21 Iber
22 James
23 Jay
24 Jimmy
25 [redacted]
26 Juan
27 Juan II
28 Kenan
29 Khalid
30 Lucky
31 Lu
32 Lu
33 M
34 M
35 M
36 R
37 S
38 S
39 S
40
41
42
43
44
45
46

13919.73
-325.83
13593.90
42
@ 323.66

Please do not write anything in the shaded area.

	Transfer	Credit Card Tip
	325.83	$270.83
Adnan ✓	W/out	90.42 + 90.42
Bekim ✓	325.83	90.42
Elvi ✓	W/out	90.42

MCI049248

6XX

D. 424.00 - 7.67 **Lunch** T@ 2.86 2.20.
B.

Daily Tip Sheet
Day: Thur
Date: 12.11.14

No. of Waiters: (8)
+ 1 TRAINee

1386.23
- 25.00
1361.23

88 X 41.01 @ 1.45 9u
T@ 41.67 T3 48.3

Please do not write anything in the shaded area.

1 Adem
2 Al
3 Amir
4 Anass ✓
5 Andre
6 Andy ✓
7 Ante
8 Arlino
9 Bardhyl ✓
10 Behram ✓
11 Carlos ✓
12 Chris
13 Elvis
14 Ermal
15 Francisco
16 Fredy
17 Gerardo
18 Gianni
19 Gipa
20 Ian
21 Iber
22 James
23 Jay
24 Jimmy
25 [redacted]
26 Juan
27 Juan II
28 Kenan
29 Khalid
30 Lucky ✓
31 Luis ✓
32 Luis II ✓
33 Marco
34 Milazim ✓
35 Mostafa ✓
36 Rashid
37 Sadik ✓
38 Sayed ✓
39 Silvio
40 Val
41 Valon
42 Xavit
43 Youssef ✓
44 Ossan ✓ TRAINer
45 Amancas
46 Hrvew Heelon

Transfer	Credit Card Tip
	$ 67
[redacted]	
Bekim ✓	$ 25 + 67
[redacted]	

Please Do not cut this sheet in Half

69.0X 1626

D. 4908.48 - 18.91 **Dinner**
B. 283.29 - 14.17 2125 - 10.63

Daily Tip Sheet
Day:
Date:

No. of Waiters: 40

15,400.84
16286.19
- 420.95
15865.24
15 14979.89
8+1/3 14979.46
219 @ 1050.88 999.46
T3 @ 350.50 332.9
325.9?

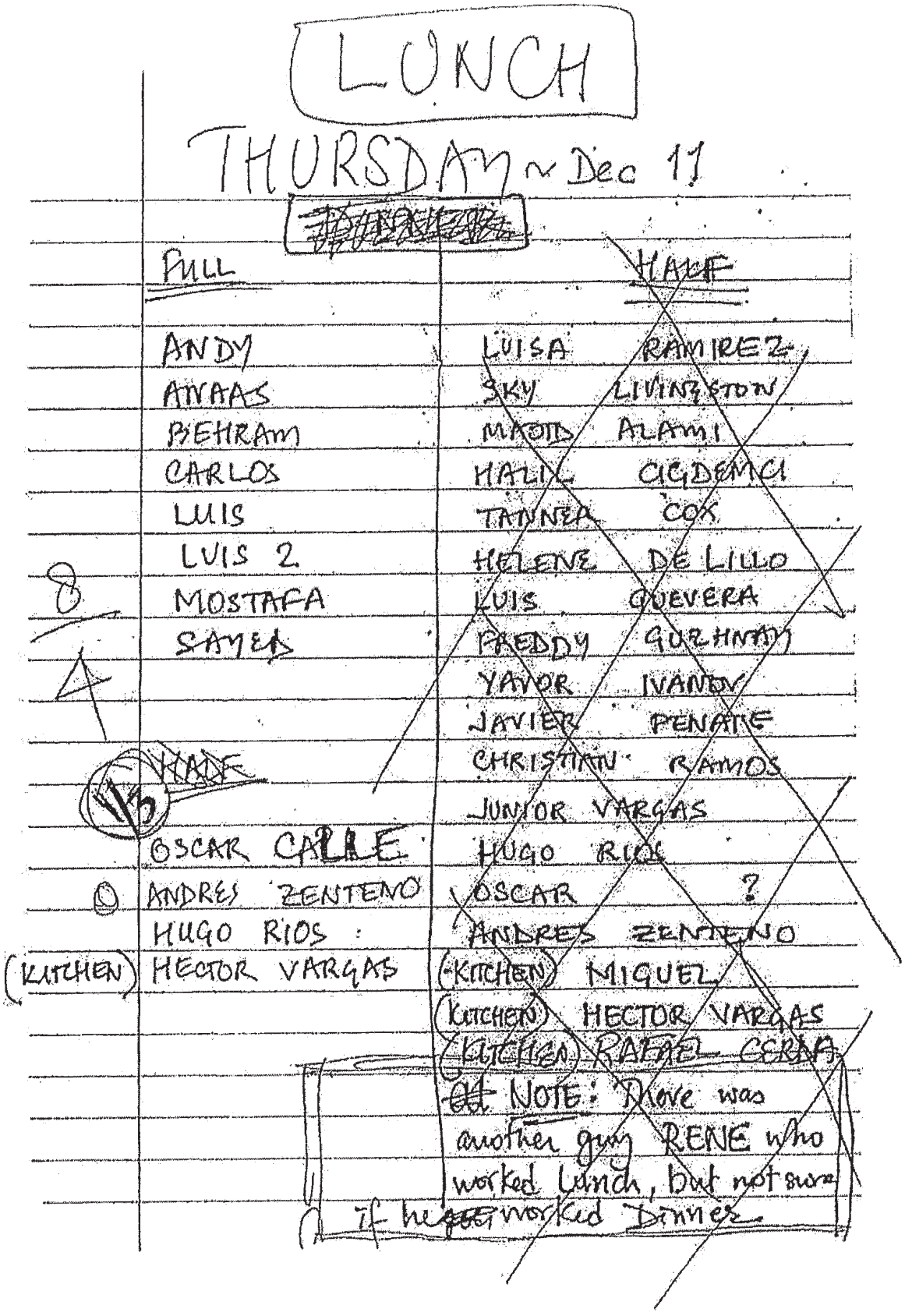
Please do not write anything in the shaded area.

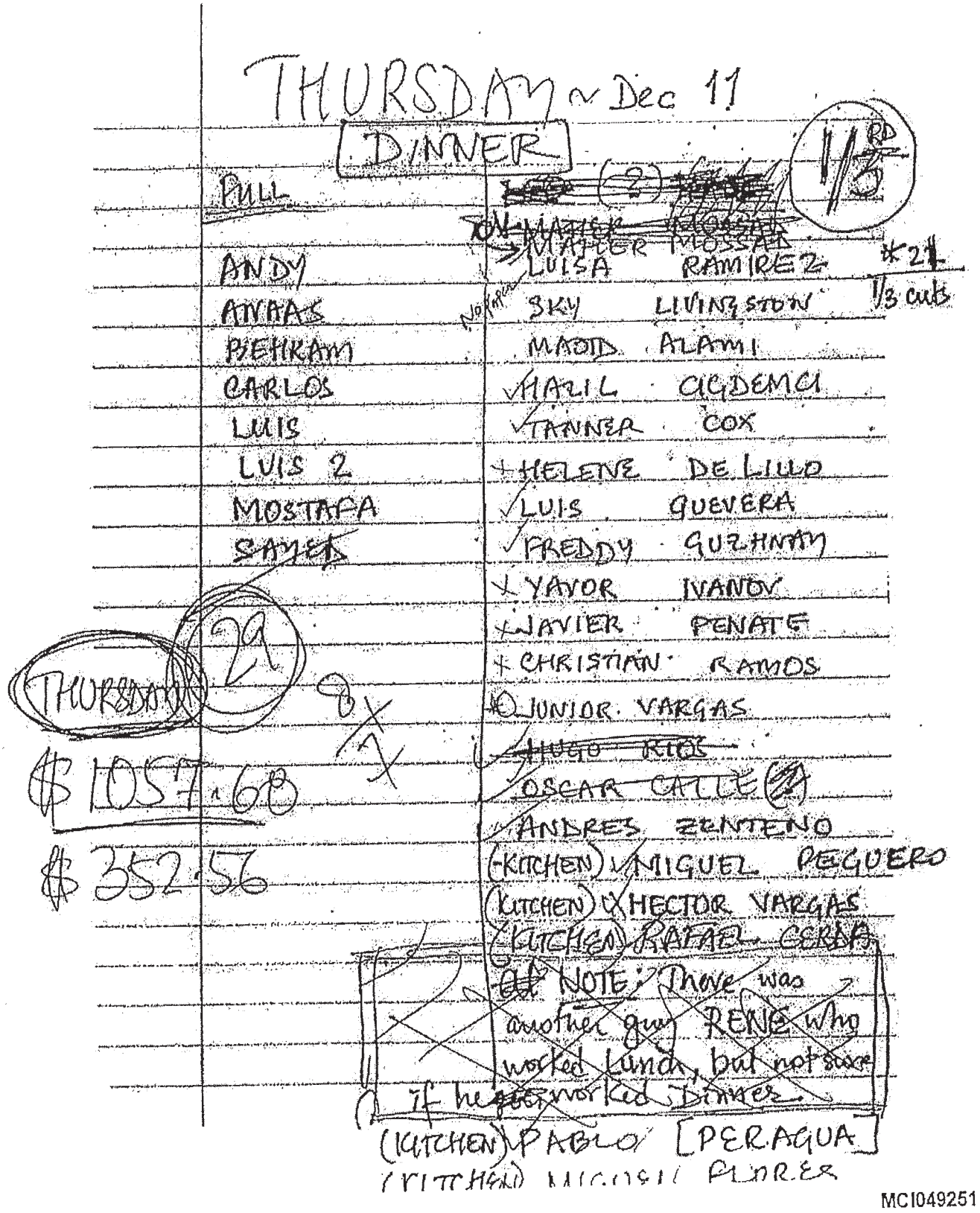
1 Adem
2 Al
3 Amir
4 Anass
5 Andre
6 Andy
7 Ante
8 Arlino
9 Bardhyl
10 Behram
11 Carlos
12 Chris
13 Elvis
14 Ermal
15 Francisco
16 Fredy
17 Gerardo
18 Gianni
19 Gipa
20 Ian
21 Iber
22 James
23 Jay
24 Jimmy
25 [redacted]
26 Juan
27 Juan II
28 Kenan
29 Khalid
30 Lucky
31 Luis
32 Luis II
33 Marco
34 Milazim
35 Mostafa
36 Rashid
37 Sadik
38 Sayed
39 Silvio
40 Val
41 Valon
42 Xavit
43 Youssef
44
45
46

Transfer	Credit Card Tip
420.95	885.35
105.24	221.34
MIKE ~~Adam~~ 140.32	+ 295.12
	442.64
Bekim 210.48 140.32	+ 295.12
CHRIS ~~Rsst~~ 140.32	+ 295.12
105.24	221.34

T.7 11/2
7 11/2

Please Do not cut this sheet in Half


LUNCH
THURSDAY ~ Dec 17
FULL
HALF
ANDY
ANAAS
BEHRAM
CARLOS
LUIS
LUIS 2.
MOSTAFA
SAYED
8
4
OSCAR CALLE
ANDRES ZENTENO
HUGO RIOS
(KITCHEN) HECTOR VARGAS
LUISA RAMIREZ
SKY LIVINGSTON
MAJID ALAMI
HALIL CIGDEMCI
TANNER COX
HELENE DE LILLO
LUIS QUEVERA
FREDDY GURUNG
YAVOR IVANOV
JAVIER PENATE
CHRISTIAN RAMOS
JUNIOR VARGAS
HUGO RIOS
OSCAR ?
ANDRES ZENTENO
(KITCHEN) MIGUEL
(KITCHEN) HECTOR VARGAS
NOTE: There was another guy RENE who worked lunch, but not sure if he worked Dinner


THURSDAY ~ Dec 11
DINNER
PULL
ANDY
AIYAAS
PETHRAM
CARLOS
LUIS
LUIS 2
MOSTAFA
SAYED
MASTER MOSSAB
LUISA RAMIREZ
SKY LIVINGSTON
MAJID ALAMI
MALIL CIGDEMCI
TANNER COX
HELENE DE LILLO
LUIS GUEVERA
FREDDY GUZMAN
YAVOR IVANOV
JAVIER PENATE
CHRISTIAN RAMOS
JUNIOR VARGAS
OSCAR CATTE
ANDRES ZENTENO
(KITCHEN) MIGUEL PEGUERO
(KITCHEN) HECTOR VARGAS
(KITCHEN) RAFAEL CERDA
NOTE: There was another guy RENE who worked Lunch, but not sure if he worked Dinner.
(KITCHEN) PABLO [PERAGUA]
(KITCHEN) MICHAEL PINDER
THURSDAY 29
$1057.68
$352.56

D. 202.18-484 **Lunch**
B. 34.46-517

Daily Tip Sheet
Day: FR 10-4
Date: 12-12-14

No. of Waiters: _____

1 Adem
2 Al
3 Amir
4 Anass ✓
5 Andre
6 Andy
7 Ante
8 Arlino
9 Bardhyl
10 Behram ✓
11 Carlos ✓
12 Chris
13 Elvis
14 Ermal
15 Francisco
16 Fredy
17 Gerardo
18 Gianni
19 Gipa
20 Ian
21 Iber
22 James
23 Jay
24 Jimmy
25 [redacted]
26 Juan
27 Juan II
28 Kenan
29 Khalid
30 Lucky
31 Luis ✓
32 Luis II ✓
33 Marco
34 Milazim
35 Mostafa
36 Rashid
37 Sadik
38 Sayed ✓
39 Silvio
40 Val
41 Valon
42 Xavit
43 Youssef ✓
44 [redacted] ✓
45 OSCAR ✓
46

Please do not write anything in the shaded area.

Transfer	Credit Card Tip
70.00	$179
Bekim ✓	$45 +
CHRIS ✓	$25 +

Please Do not cut this sheet in Half

D. 2777.14-19.14 **Dinner**
B. 202.87-10.15

Daily Tip Sheet
Day:
Date:

No. of Waiters: 10

1 Adem
2 Al
3 Amir
4 Anass
5 Andre
6 Andy
7 Ante
8 Arlino
9 Bardhyl
10 Behram
11 Carlos
12 Chris
13 Elvis
14 Ermal
15 Francisco
16 Fredy
17 Gerardo
18 Gianni
19 Gipa
20 Ian
21 Iber
22 James
23 Jay
24 Jimmy
25 [redacted]
26 Juan
27 Juan II
28 Kenan
29 Khalid
30 Lucky
31 Luis
32 Luis II
33 Marco
34 Milazim
35 Mostafa
36 Rashid
37 Sadik
38 Sayed
39 Silvio
40 Val
41 Valon
42 Xavit
43 Youssef
44
45
46

Please do not write anything in the shaded area.

Transfer	Credit Card Tip
333.35	153.50
Bekim	166.64

Please Do not cut this sheet in Half

MCI049252

FRIDAY 12/12

DAY DINNER DATE

FULL

ANAAS
ANDY
BEHRAM
CARLOS
LUIS
LUIS (2)
MOSTAFA
SAYED

1/3 RD ~from KITCHEN

HECTOR VARGAS
[redacted]
MIGUEL PEGUERO
(N) MIGUEL FLORES
PABLO [PERAGUA]
RAFAEL CERDA
(N) JOSE LUIS MARTINEZ

1/3 RD

LUISA RAMIREZ
SKY LIVINGSTON
MAJID AZAMI
(N) EDWARD CASSIN
HALIL CIGDEMCI
TANNER COX
[redacted]
LUIS (3) GUEVARA
FREDDY GUZHNAY
IVAN IVANOV
HUGO RIOS
OSCAR CALLE
ANDRES ZENTENO
[redacted]
(N) MAX VASHTNUV
[redacted]
JUNIOR VARGAS
(N) JOSE PLUMA

8
21
904
301

MCI049253